CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1927

METROPOLITAN LIFE INSURANCE COMPANY v. RUTH BODDIE AND G. C. COLLINS, ADMINISTRATOR OF THE ESTATE OF CARLTON H. BODDIE.

(Filed 14 September, 1927.)

Physicians and Surgeons—Confidential Relations—Insurance, Life—Evidence—Application for Policy—Misrepresentations—Statutes—Finding of Court—Appeal and Error.

Before a physician may testify to matters arising in his confidential relationship with his patient, our statute requires that the trial judge find that in his opinion such testimony is "necessary to a proper administration of justice," and in the absence of such finding appearing of record on appeal, it is reversible error for the trial judge upon defendant's exception to admit testimony of the insured's physician tending to show that the insured in his application for life insurance had made misstatements of material facts that would avoid the insurer's liability in his suit to cancel the policy issued thereon.

APPEAL by defendants from *Nunn, J.*, and a jury, at February Term, 1927, of NASH. New trial.

This action was commenced by the plaintiff against the defendants to compel the cancellation of Metropolitan Life Insurance Company Policy No. 3644819, on the life of Carlton H. Boddie, for that the statements and representations, as contained in the application, were untrue, material and fraudulent. The defendants, widow and administrator of the deceased, deny the material allegations of the complaint and deny that the deceased made any false representations to the knowledge of the defendants, and allege that if any misrepresentations appeared in the policy, that they were immaterial and not fraudulent.

Winston & Brassfield for plaintiff.
Austin & Davenport and D. W. Perry for defendants.

CLARKSON, J. Dr. J. A. Winstead was introduced as a witness for the plaintiff and stated that he knew Carlton H. Boddie, defendant G. C. Collins' intestate, and was his family physician since 1919. The defendants objected. The objection was overruled; exception and assignment of error were duly made. The testimony of Dr. Winstead was offered for the purpose of showing that the statements and representations as contained in the application for the policy in plaintiff's company were untrue. The application was dated 29 May, 1923. The policy was issued 2 June, 1923.

C. S., 1798, is as follows: "Communications between physician and patient. No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may acquire in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: *Provided,* that the presiding judge of a Superior Court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice."

In *Fuller v. Knights of Pythias,* 129 N. C., p. 318, it is held that a person in his application for insurance may waive the right to object to the evidence of a physician acquired while attending him and the physician may be compelled to testify.

In the application now under consideration there was no waiver clause as in the *Fuller case.*

In *Smith v. Lumber Co.,* 147 N. C., 62, the testimony of the physician did not come within the purview or scope of the statute.

In *S. v. Martin,* 182 N. C., p. 846, the defendant, Martin, was indicted for procuring the miscarriage or abortion of Rosa Yow, a pregnant woman. Dr. Mimms attended her, and his testimony related to a conversation implicating the defendant. The privilege is for the *benefit of the patient alone*—Rosa Yow, not defendant Martin. In the *Martin case* the Court said, at p. 850: "If the privilege is for the benefit of the patient alone, how can the defendant invoke its aid? Even if it be contended that the privilege was available to him on the ground that some of the communications were made in his presence, that Rosa became a party to the crime by consenting to the abortion, that she is living, and the physician's testimony would tend not only to convict him, but to discredit her, and that the evidence objected to was for these reasons incompetent, a complete answer is found in the proviso of the statute and *in his Honor's statement that in his discretion he not only permitted, but required Dr. Mimms to testify when called as a witness for the State. His Honor no doubt did so because in his opinion the testimony of Dr. Mimms was necessary to a proper administration of justice."* (Italics ours.)

In *Myers v. State* (Indiana), 24 A. L. R., p. 1196, the annotations cite numerous cases where the privilege does not exist as to family matters or affairs incidentally learned by physicians while professionally attending patients.

The serious question presented was the exception and assignment of error of defendants sufficient to permit defendants in this Court to take advantage of the proviso of the statute, or was it waived? We hold that the exception was sufficient, the matter was not waived and the assignment of error should be sustained. Jones' Commentaries on Evidence (The Blue Book of Evidence), sec. 761.

At common law no privilege existed as to the confidential relations between physician and patient. Wigmore on Evidence, vol. 5, 2 ed., sec. 2380. In its wisdom the General Assembly of this State has seen fit to pass the statute above quoted. We think that in construing same it was incumbent on the presiding judge to find the fact, and this should appear in the record in substance, that in his opinion, the disclosure is necessary to a proper administration of justice. Under the statute, the evidence is incompetent unless in his opinion the same was necessary to a proper administration of justice. The disclosures of a physician as to what takes place between him and his patient has from time immemorial been held by the medical profession as inviolate.

Principles of Medical Ethics adopted by The American Medical Association, at the annual session in New Orleans, May, 1903, among the Duties of Physicians to Their Patients, are the following:

"Sec. 2. Every patient committed to the charge of a physician should be treated with attention and humanity, and reasonable indulgence should be granted to the caprices of the sick. Secrecy and delicacy should be strictly observed; and the familiar and confidential intercourse to which physicians are admitted, in their professional visits, should be guarded with the most scrupulous fidelity and honor.

Sec. 3. The obligation of secrecy extends beyond the period of professional services; none of the privacies of individual or domestic life, no infirmity or disposition, or flaw of character observed during medical attendance should ever be divulged by physicians, except when imperatively required by the laws of the State. The force of the obligation of secrecy is so great that physicians have been protected in its observance by courts of justice."

A physician should not be subpœnaed to court and compelled to make disclosures and open the door to the confidential relationship unless required to do so in the manner provided by the statute. We think this is fair to the physician and a right interpretation of the statute. This finding of record should be afforded the physician to protect him from criticism, and no doubt loss of prestige and practice, if his patient objects to his testifying.

As to the other assignments of error made by defendants, they are unnecessary to be considered, as the case goes back for a new trial.

New trial.

MORRIS & COMPANY v. D. W. CLEVE ET AL.

(Filed 14 September, 1927.)

Appeal and Error—Objections and Exceptions—Premature Appeals—Dismissal—Pleadings—Amendments—Courts.

Where the trial judge has allowed the plaintiff's motion to amend his complaint upon due notice, within ten days after the receipt of the certificate by the clerk of the trial court from the Supreme Court on a former appeal, sustaining a demurrer to the complaint, the procedure is, if objected to by the defendants, to note an exception and appeal from the final judgment, and an appeal otherwise will be dismissed as premature.

APPEAL by defendants, D. W. and W. A. Cleve, from *Daniels, J.*, at April Term, 1927, of BEAUFORT.

The facts are stated in the opinion.

Ward & Grimes and H. C. Carter for plaintiff.
Guion & Guion and W. C. Rodman for defendants.

STACY, C. J. This case was before us at the Spring Term, 1927, and is reported in 193 N. C., 389. Within ten days after the receipt of the certificate from this Court, sustaining the demurrer interposed by the present appealing defendants, the plaintiff, after due notice, moved for leave to amend the complaint under C. S., 515. (See, also, C. S., 546, and annotations thereunder.) This motion was allowed, and from the order permitting plaintiff to file an amended complaint the defendants, D. W. Cleve and W. A. Cleve, appeal, assigning error in said ruling. The appeal must be dismissed as premature, since the proper procedure was to note an exception and appeal from the final judgment, if adverse to the defendants. *Goodwin v. Fertilizer Works,* 123 N. C., 162; *Parker v. Harden,* 122 N. C., 111.

Appeal dismissed.

H. J. COMBS v. C. M. COOPER.

(Filed 14 September, 1927.)

Bills and Notes—Instructions—Evidence—Questions for Jury.

Where there is evidence that the plaintiff was a holder in due course for value of a negotiable note, the subject of the action, acquired before maturity without notice of an infirmity, and also that the note was a part of an advertising contract from which it had been detached, thus altering its negotiable character so as to make it void in the hands of the plaintiff, a peremptory instruction in plaintiff's favor is reversible error, there being more than a scintilla of evidence for the defendant for the jury to determine.

APPEAL by plaintiff from *Clayton Moore, Special Judge,* at June Term, 1927, of PASQUOTANK.

Civil action to recover on what purports to be a negotiable promissory note for $156, alleged to have been executed by the defendant to Arthur Cohn, 6 April, 1925, duly endorsed to the plaintiff for a valuable consideration, before maturity and without notice of any defect or equity, constituting the plaintiff a holder thereof in due course. There is evidence on behalf of the plaintiff tending to support his allegations.

The defendant, on the other hand, offered evidence tending to show that the note in question was a part of an advertising contract from which it had been detached or torn, so materially altering its executory provisions as to render it void in the hands of the plaintiff.

On an issue of indebtedness, submitted to the jury, the court, at the request of the defendant, gave the following instruction: "If you believe the evidence and facts as testified to you will answer the issue, Nothing."

From a verdict and judgment in favor of the defendant, the plaintiff appeals, assigning the above instruction as error.

Aydlett & Simpson for plaintiff.
McMullan & LeRoy for defendant.

STACY, C. J., after stating the case: In directing a verdict for the defendant, the learned trial judge evidently overlooked the testimony of the plaintiff. Where the evidence is equivocal or conflicting, as in the present case, and fairly susceptible to more than one inference, the matter should be left to the jury, under a proper charge, without peremptory instructions from the court. *Moore v. Ins. Co.,* 193 N. C., 538; *Brooks v. Milling Co.,* 182 N. C., 258. Such was the holding in *Everett v. Receivers,* 121 N. C., 519 (as stated in the first head-note): "Where, in the trial of an action, the plaintiff has produced some evidence, or more than a *scintilla,* in support of his contention, or there is conflicting evidence, it is the province of the jury to determine its weight, and it would be improper to instruct the jury that if they believe the evidence the plaintiff cannot recover."

We cannot say from the record that the error in the present instruction was harmless.

New trial.

WILLIAM BARCO & SON ET AL. v. W. F. FORBES.

(Filed 14 September, 1927.)

Bills and Notes—Fertilizer—Contracts—Renewal—Failure of Consideration—Waiver—Defenses.

Where the purchaser of fertilizer has given his note for the purchase price, and after the crops upon which it has been used have been gathered and the result of the use of the fertilizer seen, he may not give a renewal note for the amount due and thereafter resist recovery thereon, upon the ground that the fertilizer was worthless, and did not come up to contract, and therein there was a failure of consideration.

CIVIL ACTION, before *Daniels, J.,* at March Term, 1927, of CURRITUCK.

The plaintiffs brought a suit against the defendant upon a note in the sum of $227.25. The note was given for the purchase price of fertilizer purchased by the defendant from the plaintiffs. The note was dated 10 January, 1923, and it was admitted that this note was given in renewal of a former note dated 1 July, 1922. The defendant contended that the fertilizer was bought for use in producing a sweet potato crop in the year 1922, and that the fertilizer delivered was worthless and had no effect whatever upon the crop. The evidence disclosed that digging time for this crop is in July and early August, and that the defendant attempted to dig the potatoes, and dug some of them, and shipped them and sold them, but the balance of the potatoes were left in the field.

The following issue was submitted to the jury: Did the plaintiffs fail to deliver to the defendant fertilizer contracted to be sold? The jury answered the issue, "Yes."

The trial judge refused to sign a judgment in favor of the defendant upon the verdict, and the plaintiffs, having moved for judgment upon the admissions made of record, and the court being of the opinion upon said admissions, that the plaintiffs were entitled to judgment for the amount of the note, entered judgment that the plaintiffs recover from the defendant the amount of the note, with interest and cost.

From this judgment, so entered, the defendant appealed.

Ehringhaus & Hall for plaintiffs.
Aydlett & Simpson for defendant.

BROGDEN, J. The question is this: If a note is given for the purchase price of fertilizer, and there is a total or partial failure of the consideration, and the maker of the original note executes a renewal note, after knowledge of the failure of the consideration, can such maker resist the payment of the renewal note?

When the fertilizer was purchased in 1922, the defendant gave a note for the purchase price. The evidence discloses that the time for harvesting the crop was in July or August, 1922, and that the potatoes were dug at that time. It is obvious, therefore, that in August, 1922, the defendant had full knowledge of the fact that the fertilizer was worthless and that there was a total failure of the consideration for the note executed by him and delivered to the plaintiffs. However, notwithstanding, on 23 January, 1923, he executed and delivered to the plaintiffs the renewal note, upon which the suit was brought.

In *Bank v. Howard,* 188 N. C., p. 550, *Connor, J.,* declared the law as follows: "One who gives a note in renewal of another note, with knowledge at the time of a partial failure of the consideration for the original note, or of false representations by the payee, waives such defense and cannot set it up to defeat or to reduce the recovery on the renewal note."

The defendant relies upon the case of *Grace v. Strickland,* 188 N. C., 369. In that case it appears that "the defendant did not discover the fraud until after he had executed the renewal note, and did not treat with the plaintiff after such discovery."

These principles of law support and justify the judgment entered in the cause.

Affirmed.

STATE v. WILL COLSON.

(Filed 14 September, 1927.)

1. **Criminal Law—Evidence—Cross-Examination—Assault and Battery—Deadly Weapon—Intent to Kill—Statutes.**

Upon a trial for an assault with a deadly weapon with intent to kill resulting in injury, C. S., 4214, it is competent for the solicitor on cross-examination of the defendant who has testified as a witness in his own behalf, to ask him if on certain occasions he has violated certain criminal laws, when confined solely to the purpose of impeaching the testimony he had given. C. S., 1799.

2. **Same—Corroborative Evidence—Declarations.**

Upon the prosecution of an action for an assault with a deadly weapon, a pistol, wherein the defendant denies he was the man who had shot the prosecuting witness, it is competent for this witness to testify that immediately after the shooting he had said to bystanders that the defendant was the man, when confined to the purpose of corroborating his testimony previously given to that effect.

3. **Same—Evidence—Verdict—Conviction of Simple Assault.**

Under an indictment for an assault with a deadly weapon, a pistol, with intent to kill, C. S., 4214: *Held*, the evidence in this case was sufficient to sustain a verdict under C. S., 4640, of an assault with a deadly weapon, which tended to show that the defendant fired at the prosecuting officer, a police officer, as the latter was attempting to stop him from driving off in his automobile in endeavoring to escape arrest under a warrant held by another police officer, who was with him for the purpose of making the arrest, with other evidence that the defendant knew the policeman fired upon as an officer of the law at the time.

APPEAL by defendant from *Moore, Special Judge,* at June Term, 1927, of PASQUOTANK. No error.

Defendant was tried upon an indictment charging him with an assault with a deadly weapon, to wit, a pistol, with intent to kill, resulting in injury. C. S., 4214. The jury found him guilty of an assault with a deadly weapon. C. S., 4640.

From judgment upon the verdict defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Thomas J. Markham and McMillan & LeRoy for defendant.

CONNOR, J. Assignments of error based upon exceptions to the overruling by the court of defendant's objections to questions addressed to him by the solicitor, upon his cross-examination as a witness in his own behalf, cannot be sustained.

These questions were manifestly for the purpose of impeaching defendant as a witness; they were competent for that purpose. The principle upon which a new trial was ordered by this Court in *S. v. Alston,* 94 N. C., 930, cited by defendant in support of these assignments of error, is not applicable upon this record. It is held in that case that "as a general rule it is not admissible, on a prosecution for one offense, to prove that the defendant had before committed another offense." Defendant in the instant case having become a witness in his own behalf, was subject to cross-examination and impeachment as any other witness. C. S., 1799. *S. v. Wentz,* 176 N. C., 745; *S. v. Cloninger,* 149 N. C., 567. It was competent for the solicitor to ask the defendant, on his cross-examination, for the purpose of impeachment, if he had not on a certain occasion violated the prohibition law, and if he had not adjusted in court a charge that he had failed to support his wife. *S. v. Holder,* 153 N. C., 606; *S. v. Thomas,* 98 N. C., 599.

Statements of the prosecuting witness that defendant, Will Colson, was the man who shot him with a pistol as he stood upon the running-board of the automobile, and thus inflicted the wound upon his head, made immediately after he had fallen from the running-board, to bystanders, were competent as evidence tending to corroborate his testimony as a witness. They were offered and admitted for this purpose only. The court at the time they were admitted so instructed the jury. Defendant's assignments of error with respect to the admission of this evidence cannot be sustained.

Evidence offered by the State tended to show that F. T. Winslow, a police officer, went to the home of defendant, Will Colson, in Elizabeth City, about 9:30 p.m. on 4 June, 1927, in response to a telephone call; that he was accompanied by another police officer, who had a warrant to be served on defendant; that as the two officers approached defendant's home they saw a man leave an automobile standing on the street, near defendant's home; and that a man sitting in the automobile, immediately upon seeing the officers approaching defendant's home, started the motor, as if to drive away. Officer Winslow went at once to the automobile and ordered the man sitting at the steering wheel not to drive away. He testified that the man in the automobile was defendant Will Colson. He was the only man in the automobile. He knew Winslow, and knew that he was a police officer. Winslow jumped upon the running-board and attempted to cut off the switch, and thus prevent defendant from driving the automobile away. Winslow testified that defendant Colson drew and fired a pistol at him; he felt a burning sensation about his head, and fell from the running-board to the ground. The automobile was then driven away.

Defendant Colson, as a witness in his own behalf, testified that he was not the man in the automobile; that he left his home that night about 8:30 and did not return until after 10:30. There was evidence tending to corroborate him.

All the evidence tended to show that the man in the automobile fired a pistol at officer Winslow, thereby inflicting a serious wound upon his head. The jury, upon competent evidence found that defendant was the man in the automobile who fired the pistol. Not being satisfied beyond a reasonable doubt that defendant fired the pistol with intent to kill, the jury found him guilty of an assault with a deadly weapon, in accordance with instructions contained in the charge of the court.

We find no error in the instruction complained of by defendant and made the subject of his exception No. 23. This instruction is not susceptible of the construction insisted upon by defendant upon his appeal to this Court, to wit, that the defendant was guilty of an assault with a deadly weapon, if he simply pushed the officer off the running board. The court expressly instructed the jury that if they did not find that defendant assaulted the witness with a deadly weapon, but "just shoved him off the running-board of the automobile," he would be guilty of only a simple assault. We find

No error.

HONIG & HOCHENBERG v. N. HAWA.

(Filed 14 September, 1927.)

Courts—Jurisdiction — Justices of the Peace — Waiver — Constitutional Law.

Where the defendant is sued on two accounts before a justice of the peace separately stated, each appearing to be in amount coming within his jurisdiction, but together exceeding it, by his appearing and acknowledging his liability for the sum total he thereafter waives his right on appeal to set up the defense that in fact the two accounts were but one, and he may not insist that the judgments rendered against him by the justice were unconstitutional and void for the want of jurisdiction. Const. of N. C., Art. IV, sec. 27.

APPEAL by defendant from *Clayton Moore, Special Judge,* at June Term, 1927, of PASQUOTANK. Affirmed.

Thompson & Wilson for plaintiffs.
McMullan & LeRoy for defendant.

CLARKSON, J. The defendant testified in part: "I received the goods represented by the invoices which I offered in evidence. There were two separate purchases on two separate orders, one order sent in one week and the other the next, and the goods came to me in two different shipments, one one week and the other the next, on different invoices, and notwithstanding I received the plaintiffs' goods in 1925, I have not paid them a single cent and owe them for every dollar's worth of goods represented by the invoices. The payment which I made plaintiffs on 23 November, 1925, covered a bill of goods which was shipped me on 20 October, 1925, less the discount. I listed in my invoice book in my own handwriting the two separate invoices of 18 November and 25 November, and the amounts are correct. There was a trial at the court of T. B. Wilson, justice of the peace. Two summonses were served on me by the constable, one of which demanded $103.75 and the other $120.75. Neither I nor Mr. Honig had any lawyer to represent us in the justice's court. *I was there and admitted the correctness of the invoices and stated that the only reason they were not paid was I did not have the money to pay them. That was the only defense I set up to the action,* and Mr. Wilson rendered judgments against me and I appealed to this court."

The invoice of the goods sold by plaintiffs to defendant 18 November, 1925, was $103.75. The invoice on 25 November, 1925, was $120.75. Action was instituted on the two different invoices before the justice of the peace. The return of the justice of the peace on appeal in each case shows that defendant made no plea. He testified in part: "*There was no defense set up in my court to the effect that I did not have jurisdiction because the account had been split up, nor was there any plea in abatement entered in my court.*"

In the Superior Court the defendant entered a plea in abatement, moved to dismiss on the ground that the account was stated and the justice of the peace had no jurisdiction; that statements showing a total indebtedness of $224.50 were presented by plaintiffs to defendant on three different occasions before suit was brought and defendant admitted the correctness, and on the occasion of the last statement promised plaintiffs to pay said amount. Sum demanded shall not exceed $200 before justice of the peace on contracts. Const. N. C., Art. IV, sec. 27.

In the court below the parties agreed to submit the controversy to the trial judge without a jury. In rendering judgment for plaintiffs, the court below held: "That the defendant did not enter a plea in abatement or move to dismiss for want of jurisdiction at the time of the trial before the justice of the peace; and the court being of the opinion that the defendant has waived his plea to the jurisdiction by not entering it before the justice."

The plaintiffs brought two actions on the different invoices in the court of a justice of the peace. See *Mayo v. Martin,* 186 N. C., p. 1. Defendant was duly served with summons in each action. From the summonses and complaints in the justice of the peace court, it clearly appeared that it had jurisdiction. If it was a *stated account,* the fact was not set up by defendant. He appeared, made no objection to plaintiffs' "splitting up" the account, and in fact admitted the correctness of the two invoices. The only defense to the two actions was "I did not have the money to pay them." The plea that the account was stated came too late in the Superior Court.

It is well settled that if a justice of the peace exceeds his jurisdiction, the judgment is void. If this defect does not appear on the face of the proceedings, it must be made to appear by plea and proof. We think the present action comes under the third distinction set forth in *Branch v. Houston,* 44 N. C., at p. 88, as follows: "3. If the subject-matter is within the jurisdiction, and there be any peculiar circumstance excluding the plaintiffs, or exempting the defendant, it must be brought forward by a plea to the jurisdiction. Otherwise, there is an implied waiver of the objection, and the court goes on in the exercise of its ordinary jurisdiction." *Blackwell v. Dibbrell,* 103 N. C., 270; *Beville v. Cox,* 109 N. C., 265; *Hicks v. Beam,* 112 N. C., 642; *S. v. Efird,* 186 N. C., 482.

In *Insurance Co. v. R. R.,* 179 N. C., at p. 293, it is said: "In *Fort v. Penny,* 122 N. C., 232, in which objection was made in the Superior Court to dividing a cause of action in order that actions might be commenced before a justice of the peace, it was held: 'If the proofs had shown as matter of fact that the two demands appearing in the two summonses were one and the same transaction, and therefore indivisible,' the defendant must file plea in abatement, and upon failure to do so the objection was waived, and upon the same principle this action may be maintained." *In re Smiling,* 193 N. C., p. 448. The judgment below is

Affirmed.

E. G. WESTON v. SOUTHERN RAILWAY COMPANY.

(Filed 14 September, 1927.)

1. **Negligence—Automobiles—Headlights—Highways — Rule of Prudent Man.**

   The motorist upon a public highway on a dark, misty and foggy night, is required to regulate the speed of his car with a view to his own safety according to the distance the light from his headlights is thrown in front of him upon the highway, and to observe the rule of the ordinary prudent man.

2. **Same—Speed Limits—Statutes—Evidence—Nonsuit.**

The failure of a motorist to stop his automobile before crossing a railroad at a grade crossing on a public highway, as directed by 3 C. S., 2621(b) "at a distance not exceeding fifty feet from the nearest rail," does not constitute contributory negligence *per se* in his action against the railroad company to recover damages to his car caused by a collision with a train standing upon the track, and where the evidence tends only to show that the proximate cause of the plaintiff's injury was his own negligence in exceeding the speed he should have used under the circumstances, a judgment as of nonsuit thereon should be entered on defendant's motion therefor properly entered.

3. **Negligence—Automobiles— Evidence — Nonsuit — Highways — Headlights.**

Where the evidence tends only to show that the plaintiff was exceeding the speed required for his own safety under the rule of the prudent man in running his automobile on a dark and foggy night over a grade crossing with a railroad track, without stopping, and his car was injured by coming in contact with defendant's train standing thereon awaiting dispatch orders to move forward: *Held*, insufficient to take the case to the jury in plaintiff's action against the railroad company for damages thereby sustained in a collision with the defendant's train, and a motion for judgment as of nonsuit thereon should be granted upon the issue of plaintiff's contributory negligence.

CIVIL ACTION, before *Daniels, J.*, at February Term, 1927, of BEAUFORT. Reversed.

The plaintiff alleged: "That on the morning of 1 October, 1926, about 3 o'clock a.m., the plaintiff was driving his Dodge sedan from Charlotte to Salisbury on said public highway at a moderate rate of speed; that the night was dark and cloudy and a misting rain was falling; that the plaintiff was not familiar with the locality in which he was and did not know that said railroad track crossed the highway at that point; that at said time the defendant . . . negligently stopped and permitted to remain across the highway and upon the track of defendant a long freight train, which at said time was stationary, and which completely blocked the highway; that the defendant negligently failed to give any sign whatsoever of the presence of said freight train across the highway by means of lights or any other signal or device; . . . that the plaintiff could not, in the use of ordinary care, discover the presence of said train until he was too close to the same to avoid a collision, and in attempting to do so, his car was turned to the side of the road where it was completely turned over and utterly demolished."

The defendant entered a general denial to the allegations of negligence contained in the complaint and pleaded contributory negligence of the plaintiff as the proximate cause of his injury and as a bar to recovery, alleging in substance that the plaintiff failed to stop, look or listen, and in disregard of the "N. C. law stop sign," drove ahead without sufficient headlight, failing to keep the proper lookout and at too great a speed.

Issues of negligence, contributory negligence and damages were submitted to the jury, and the jury by its verdict found that the defendant was guilty of negligence and that plaintiff was not guilty of contributory negligence, and assessed damages in the sum of $1,100.

From the judgment upon the verdict the defendant appealed, assigning error.

Stewart & Bryan and H. C. Carter for plaintiff.
Harry McMullan for defendant.

BROGDEN, J. What duty does the law impose upon a motorist driving at night with reference to railroad grade crossings when the vision of the driver is obscured by rain, fog or mist, and the pavement is wet and slippery?

In *Coleman v. R. R.*, 153 N. C., p. 322, *Brown, J.*, writes: "A railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence and will be so declared by the Court."

Again in *Holton v. R. R.*, 188 N. C., p. 277, *Hoke, C. J.*, declares the law thus: "It is the recognized duty of a person on or approaching a railroad crossing to 'look and listen in both directions for approaching trains if not prevented from doing so by the fault of the railroad company or other circumstances clearing him from blame,' and where, as to persons other than employees of the company, there has been a breach of this duty clearly concurring as a proximate cause of the injury, recovery therefor is barred."

3 C. S., 2621(b), requires every person operating a motor vehicle, approaching a railroad grade crossing (except as otherwise provided therein), to stop "at a distance not exceeding fifty feet from the nearest rail." However, a failure to stop does not constitute contributory negligence *per se,* but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence.

In the present case the plaintiff testified that he did not see the railroad crossing at all by reason of the location of the track, and particularly by reason of the fact that the rain and mist obscured his vision, rendering it impossible for him to see the crossing more than thirty-five feet ahead. Hence, in the final analysis, the case presents the question of the duty of an automobile driver, operating his car in the night time, with his vision obscured by rain or other conditions upon the highway.

The identical question has not been determined in this State. In *Hughes v. Luther,* 189 N. C., 841, this Court declared the law to be that if a motorist in the night time could see a truck parked by the roadside in violation of C. S., 2615, a distance of seventy-five yards, and while operating his car at a speed of 27 or 28 miles an hour, struck the truck, his own negligence was the proximate cause of his injury as a matter of law, and therefore he was not entitled to recover damages from the owner of the truck, even though the truck was parked unlawfully on the highway. In short, the driver could see, but would not slacken his speed or stop or take any precaution for his own safety, but plunged ahead apparently regardless of consequences.

The present case presents to a certain degree an opposite aspect of the law, as the evidence discloses that the plaintiff could not see more than 35 feet because of rain and mist which obscured his vision, and yet he swept on at a speed of 30 or 35 miles an hour.

The general rule under such circumstances is thus stated in Huddy on Automobiles, 7 ed., 1924, sec. 396: "It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his light, or within the distance to which his lights would disclose the existence of obstructions. . . . If the lights on the automobile would disclose obstructions only ten yards away it was the duty of the driver to so regulate the speed of his machine that he could at all times avoid obstructions within that distance. If the lights on the machine would disclose objects further away than ten yards, and the driver failed to see the object in time, then he would be conclusively presumed to be guilty of negligence, because it was his duty to see what could have been seen." The rule thus expressed finds accurate and ample support in the authorities cited. For instance, the Michigan Court in 1922, in *Spencer v. Taylor,* 188 N. W., 461, said: "We think the court was right in holding plaintiff guilty of contributory negligence as a matter of law. It is well settled that it is negligence as a matter of law to drive an automobile along a public highway in the dark at such speed that it cannot be stopped within the distance that objects can be seen ahead of it."

The Ohio Court in 1926, in case of *Toledo Terminal R. R. Co. v. Hughes,* 154 N. E., 916, said: "While it is true that ordinarily the degree of care an ordinarily prudent man would use under the circumstances disclosed, is a question for a jury, however, we think the conceded facts—the lights that did not penetrate the fog, the traveling at a rate of speed such that when he discovered the train upon the track, the swinging of his wheels to the left caused the rear end of his car to swing around and catch between two freight cars, so when the train started it dragged him off the road into the ditch—all show that the plaintiff below was chargeable with contributory negligence, that he did not exercise that degree of care which one of ordinary prudence should have used, and therefore the trial court was right in directing a verdict."

The Wisconsin Court in *Lauson v. Fon Du Lac,* 123 N. W., 629, 25 L. R. A. (N. S.), 40, held: "It seems to us, and we decide, that the driver of an automobile, circumstanced as was the driver of the car in which the plaintiff was riding, and operating it under such conditions as he operated his machine on the night of the accident, is not exercising ordinary care if he is driving the car at such rate of speed that he cannot bring it to a standstill within the distance that he can plainly see objects or obstructions ahead of him. If his lights be such that he can see objects for only a distance of ten feet, then he should so regulate his speed as to be able to stop his machine within that distance."

The Supreme Court of Utah in the case of *Nikoleropoulos v. Ramsey,* 214 Pac., 304, considered this question in a decision rendered March, 1923. The defendant was operating his automobile on a public highway. "The night was stormy, with some rain, which tended to obscure his vision. The plaintiff was walking in the highway. The defendant testified: 'I hit him because I didn't see him in time to stop. In other words, I could not stop within that distance.' He further testified that at the time he could not see objects further ahead than six feet and did not see the plaintiff until within six feet of him. The defendant was traveling about twelve miles an hour. At the conclusion of the evidence the plaintiff's attorney requested the following instruction to the jury: 'You are instructed that it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within the distance which the operator of said car is able to see objects upon the highway in front of him.' The trial court refused the request and instructed the jury as follows: 'A driver of an automobile at night is required to use such reasonable and ordinary care to have his machine under such control as to not overtake and run down people within the range of his lights, as would be used by a man of average and reasonable care and prudence in his situation.' The opinion in the case declares: 'The request of plaintiff was not only a correct statement of law, but under the authorities cited, it furnished a standard of reasonable and ordinary care without the qualifying phrases injected by the trial court.' "

The principle has been recognized and applied in the states of Kansas, Tennessee, Michigan, Minnesota, Delaware, West Virginia, New Jersey, Pennsylvania and Vermont. *Fisher v. O'Brien,* 99 Kan., 621, L. R. A. (1917 F), 610; *West Cons. Co. v. White* (Tenn.), 172 S. W., 301; *Heiden v. Minneapolis Street Railway Co.,* 191 N. W., 254; *Philadelphia & Reading R. R. Co. v. Dillon,* 114 At., 62; *Ewing v. Chapman* (W. Va.), 114 S. E., 158; *Savage v. Pub. Ser. R. R. Co.* (N. J.), 99 At., 383; *Serfas v. Lehigh & N. E. R. Co.,* 113 At., 370; *Gallagher v. Montpelier & Wells River R. R.,* 137 At., 207; *Fannin v. R. R.,* 200 N. W., 651.

The standard of duty announced and applied in the foregoing authorities is broad, severe and unbending, but it appears to be a just rule, particularly in view of the fact of the appalling destruction of life and limb by motor driven vehicles upon the highways of the State.

However, it is not necessary to apply the rule strictly in order to defeat recovery in the present case. Plaintiff, narrating the occurrence, testified as follows: "I was not familiar with the road at all. The road approaching the railroad was not straight. I would say I was 35 feet from the train when I discovered it. . . . It was misting rain, the pavement was wet. . . . I got within 35 feet of the railroad when I discovered an object in front of me. When I first saw it I could not tell what the object was. In the instant I could realize what it was I put on my brakes first. When after putting on my brakes I realized on account of the pavement the brakes would not take; the road was slippery; ordinarily the car would be decreasing by the time, but instead of slowing it got faster as it skidded. I did what I thought was the best thing a reasonable man could do, and I turned my car off the highway to prevent running into the object in front, and I ran off the embankment 25 feet from the track. . . . The train was standing, completely blocking the public road. . . . I did not at that time see an N. C. stop sign. I saw it afterwards in the day time. In coming around the bend, my lights reflected on the left side of the road and the sign was on the right side. I could not see it. . . . Had good lights on the car. Dodge lights are good lights. They will throw the light ahead half of a city block, but they will not show half a block on wet asphalt pavement. . . . My excuse for running my car over the culvert was *because I could not see the train until within 35 feet of it. I was within 35 feet of it—that was the best I could see at the time. It was not possible at that distance for me to have stopped right at the* *train.* . . . I was not traveling faster than 35 miles. I said I was going 30 or 35 miles an hour. I think I was going 30 miles. . . . I would say now I was going 30 or 35 miles, possibly 30."

There was testimony that the train had stopped at the crossing in order to get permission from the dispatcher to cross the main line. There was further evidence tending to show that the box cars, blocking the crossing, were 12 to 15 feet high. Capers Young, who was in the car with the plaintiff at the time of the accident, testified that the night was damp, foggy and misty, and further stated: "I did not see anything until I got within 35 feet of the box car. If it had been a mountain, I wouldn't have seen it. You couldn't see 35 feet ahead."

An analysis of plaintiff's testimony points unerringly to the conclusion that the proximate cause of plaintiff's injury was his inability to see more than 35 feet ahead and his inability to stop his car within the distance of his vision by reason of the rapid speed of the automobile. As the motorists say, "He was out-running his headlights" upon a strange road upon which there was no traffic or glaring lights, and in disregard of the duty imposed upon him to look and listen or to observe the "N. C. stop sign," which stood upon the side of the road, silently admonishing him of possible danger or death. He saw an object in front. He says: "When I first saw it I could not tell what the object was." He made no effort to reduce his speed until it was too late. He took a chance and lost.

So far as we can discover, there is no evidence that the plaintiff took any precaution whatever for his own safety, and we therefore hold that the motion for nonsuit should have been sustained, and it is so ordered.

Reversed.

E. L. McCORMICK and J. G. McCORMICK v. D. A. PATTERSON et al.

(Filed 14 September, 1927.)

1. **Partition—Sales—Report of Commissioners—Objections and Exceptions—Statutes.**

In proceedings for partition of lands under the provisions of C. S., 3243, 3230, requiring the commissioners appointed for the sale of the lands to file their report of the sale, and that if no exception thereto is filed within twenty days the same shall be confirmed, there is no discretion in the court for the judge to order a resale for mistake of facts when the sale has been made in accordance with law, unless the exceptions of the purchaser have been substantially made within the twenty days prescribed.

2. Same—Resale—Courts—Discretion.

C. S., 3243, 3230, by the use of the word "shall" makes it a prerequisite to the power of the court to order a resale that exceptions in a recognized legal way be made to the confirmation of the report of the commissioners appointed to sell lands in partition proceedings within the twenty days prescribed therein.

3. Same—Substantial Compliance.

Where three commissioners for the sale of lands in partition proceedings for a division have regularly sold the *locus in quo* as provided by law, and two of them have filed the report of sale, and the other protests against its confirmation upon the ground of a mistake in fact and appears before the clerk and gives his reason therefor within the statutory time, his conduct may amount to a substantial compliance with the statute leaving the matter within the power of the court to order a resale.

4. Same—Appeal and Error—Record—Remand.

Where it does not appear of record in the Supreme Court on appeal whether exceptions have been duly made to the report of the commissioners appointed for the sale of land for partition within the twenty days prescribed by statute, or whether the trial judge has considered the conduct of the purchaser as a substantial compliance with the statutes as to taking exceptions to the report, and the court has ordered a resale of the lands, the case will be remanded to the end that such further facts therein be found as will sufficiently present the case for the determination of the Supreme Court.

Civil action, before *Finley, J.*, at November Term, 1926, of Scotland.

At the June Term, 1925, of the Superior Court of Scotland County, *Bryson, J.*, in a partition proceeding, entered a judgment decreeing a sale for partition of 190 38/100 acres of land and appointing R. C. Lawrence, Henry A. McKinnon and Dickson McLean as commissioners of court to make the sale, in front of the postoffice in the town of Maxton. Pursuant to said judgment the said commissioners exposed said land to public sale, as required therein, on 2 November, 1925. The report of the sale was filed the 24th day of December, 1925, and signed by only two of the commissioners, to wit, Henry A. McKinnon and Dickson McLean, the other commissioner failing to sign said report. "Shortly after the other two commissioners filed their report" the third commissioner "advised the clerk of his desire to be heard in opposition to the confirmation of the report" filed by the other commissioners. On 23 April, 1926, after notice a motion was made before the clerk to "confirm said report." At this time the third commissioner appeared in opposition to the confirmation of the report. It appearing that the clerk was related to some of the parties to the controversy, a consent order was entered, transferring the matter to be heard before the judge. The cause came on regularly to be heard by T. B. Finley, judge presiding, at the November Term, 1926, of Scotland Superior Court. At this hearing one of the parties in interest caused the report of the two commissioners to be read and moved the court to require the third commissioner to file a report. The commissioner thereupon asked to be heard, and stated that the bid of the purchasers had been induced by a material mistake of fact, in that the purchasers who were acting together, had bid $115 per acre for the land, when, in truth, they were raising their own bid, due to a mistake of fact, and that this mistake had not been discovered until after the sale had closed. After the statement of the commissioner a motion was made that he be required to file a report as commissioner, but the court stated that it would treat the evidence in lieu of a written report. Thereupon motion was made for a confirmation of the report filed by the other two commissioners. This motion was overruled and the court adjudged: "And it appearing to the court that the last bid put upon the property was induced by a mistake of fact, and the court in the exercise of its discretion being of the opinion that the report should not be confirmed, but that the land should be resold, it is thereupon considered and adjudged that the written report so filed by the two commissioners aforesaid be not confirmed; but the commissioner shall proceed to hereafter sell the lands, to be sold in the same way and manner as though it had never been sold," etc.

From the foregoing judgment the plaintiff appealed.

J. Bayard Clark for plaintiffs.
James D. Proctor for defendants.

Brogden, J. The question of law is this: In a sale of land for partition, can the court, in its discretion, refuse to confirm the report of commissioners, when such report has been filed more than twenty days and no objection is made thereto until after a motion for confirmation is lodged?

C. S., 3243, requires commissioners in partition sales to file reports of sales and provides that "if no exception thereto is filed within twenty days the same shall be confirmed." C. S., 3230, with respect to exceptions to reports of actual partition contains the same provision.

In *Floyd v. Rook,* 128 N. C., 10, an actual partition of lands had been made. The commissioners filed a report. After a lapse of about sixty days exceptions were filed to the report of commissioners and a motion made to set aside the sale. The trial judge refused to hear the exceptions to the report on the ground that they had not been filed within twenty days after the filing of the report of the commissioners, because in such case the court had no power in law to hear the exceptions. This Court held that the language of The Code, sec. 1896, now C. S., 3230, "is peremptory and cannot be explained or altered by judicial decree. . . . That requirement of The Code is a rule of law and exceptions filed after twenty days have passed from the filing of the report of the commissioners are too late to be considered, and it makes no difference whether the report has been confirmed or not when the exceptions are filed, if they are filed after the time allowed by law." The *Floyd case, supra,* has been cited in two other decisions of this Court, to wit, *McDevitt v. McDevitt,* 150 N. C., 644, and *Upchurch v. Upchurch,* 173 N. C., 88. *Hoke, J.,* in the *Upchurch case,* referring to the exceptions in the *Floyd case,* said: "Doubtless they were for some irregularities in the proceedings or because of some inequitable adjustment. In either case they were known to the parties at the time the partition was made or when the report was filed, and such objections come more nearly within the express terms and purpose of the statute." In other words, the *Upchurch case* holds that exceptions as to irregularities or inequitable adjustment "come more nearly within the express terms and purpose of the statute" and do not "impair the power of the court as to confirmation of judicial sales for inadequacy of price, evidenced by an increased and sufficient bid made before the proposed purchaser has appeared and moved for an acceptance of his bid." So that, an increased bid may be accepted by the court and a resale ordered after twenty days, provided the proposed purchaser has not theretofore moved for an acceptance of his bid. But if a motion is made for a confirmation of sale before the increased bid is offered, then the court is without discretion in the matter and must confirm the sale. As we understand it, this is the principle declared in *Ex parte Garrett,* 174 N. C., 343. In that case the Court said: "It may also be noted that in all special proceedings, except for partition, in which a report is to be filed, the statute (Rev., sec. 723, now C. S., 763), provides that if no exception is filed to the report within twenty days the court *may* confirm the same, on motion of any party, while in the statute before us (Rev., sec. 2513, now C. S., 3243), referring to partition, the word used is *shall,* thus indicating a purpose to distinguish between the two, and in one case resting a discretion in the court, and in the other making it obligatory to act." Under these decisions, therefore, the law is that, under C. S., 3243, exceptions must be filed or an increased bid placed upon the purchase price within twenty days or before a motion to confirm the sale is made.

In the case before us the trial judge ordered a resale in the discretion of the court. The correctness of this ruling depends upon the sole question as to whether or not exceptions have been filed within twenty days or before the motion for confirmation of the sale was made. In contemplation of C. S., 3243 an exception is an objection to the regularity of the proceedings or sale or because of "inequitable adjustment." Were exceptions or objections made to this sale within twenty days or prior to the time of the motion for confirmation? The record in the cause states: "No exceptions have ever been filed to said report." However, it further appears in the record that "shortly after the other two commissioners filed their report, the purchasers advised the clerk of a desire to be heard in opposition to the confirmation of the report." It further appears that thereafter on 23 April, 1926, a motion to confirm the report was made for the first time, and the purchasers appeared in opposition to the confirmation of said report. When the cause came on for hearing before the trial judge the purchasers were still present, resisting the confirmation of the sale.

The law does not require strict formality in the filing of exceptions. For instance, in *McDevitt v. McDevitt,* 150 N. C., 644, the defendant went to the clerk before the expiration of twenty days and notified him that he desired to file exceptions to the report. Thereupon the clerk entered the following memorandum upon the record: "George McDevitt, the defendant, comes into court and objects to the report of the commissioners in this cause and asks that the same be not confirmed." Later on, amended exceptions were filed. Upon the hearing, the clerk confirmed the report upon the ground that no exception had been filed within twenty days from the filing of the report. This judgment was reversed.

In the present case it appears that the purchaser notified the clerk of objection to the confirmation of the sale and thereafter, without objection, in open court, made an extended statement of the reasons why said sale should not be confirmed. It does not appear whether or not the first objection made to the clerk was within the twenty days and before the first motion of confirmation was made. Neither does it clearly appear whether or not the trial judge considered the oral statement of the purchasers as exceptions or objections to the report of the commissioners. If no notice of objection to the report was given to the clerk within twenty days or prior to the first motion for confirmation, and if the notice given and the subsequent oral statements in open court did not amount to objections or exceptions, then the trial judge was without discretion in setting aside the sale and ordering a resale. Upon the other hand, if the notice to the clerk was given before the expiration of twenty days or before the first motion for confirmation was made, and the trial judge permitted the oral statements as an amendment to the exceptions as pointed out in the *McDevitt case,* then the court had discretion to find the facts and order a resale.

The cause is remanded to the Superior Court of Scotland County for further findings of fact in accordance with this opinion.

Remanded.

W. T. COSTELLO v. T. J. PARKER.

(Filed 14 September, 1927.)

Appeal and Error—Actions—Prosecution Bond—Statutes.

A motion to dismiss for the failure of the plaintiff to file a prosecution bond, C. S., 493, 494, made for the first time in the Supreme Court on appeal, will be denied when it has been properly made to appear that plaintiff had filed a proper bond after the issuance of the summons.

APPEAL by defendant from *Daniels, J.*, at March Term, 1927, of GATES. No error.

Action to recover damages for breach of contract by defendant as landlord to furnish plaintiff, his tenant, commercial fertilizers to be used under crops.

The issues were answered by the jury as follows:

1. Did plaintiff and defendant enter into the contract alleged in the complaint? Answer: Yes.

2. If so, was there a breach of said contract by defendant? Answer: Yes.

3. If so, what damage is plaintiff entitled to recover of defendant? Answer: $200.

From judgment upon the verdict defendant appealed to the Supreme Court.

A. P. Godwin for plaintiff.
W. W. Rogers and Walter R. Johnson for defendant.

PER CURIAM. There are no exceptions in the case on appeal pertinent to the first or second issue. The only assignments of error upon defendant's appeal to this Court are based upon exceptions to portions of the charge to the jury upon the third issue. These cannot be sustained. The first exception is to a statement by the court of plaintiff's contentions; the second exception is to an instruction favorable to defendant.

Defendant's motion, first made in this Court, that the action be dismissed for failure of plaintiff to comply with C. S., 493 or C. S., 494, cannot be allowed. It appears that a prosecution bond, as required by statute, was filed by plaintiff, after summons was issued by the clerk. No motion to dismiss for failure to file the bond at the time summons was issued was made in the Superior Court. See opinion of *Clark, C. J.*, in *Rankin v. Oates*, 183 N. C., at page 521.

The judgment is affirmed. There is

No error.

IN RE SALE OF E. HOLLOWELL LAND BY SOUTHERN TRUST COMPANY, TRUSTEE.

(Filed 14 September, 1927.)

1. **Sales—Mortgages—Deeds of Trust—Statutes—Increased Bids—Commissions.**

Where lands have been sold by a trustee in a deed of trust securing the payment of a note, in accordance with the power of sale in the instrument, and under the provisions of C. S., 2591, the amount it brought at the sale has been raised, it is within the authority of the clerk of the court to allow the commission provided for in the deed to the extent of the advanced price, when reasonable, against the claim of subsequent lienors or claimants.

2. **Same—Appeal and Error.**

The allowance to the commissioner to sell lands securing a note for a loan made by the clerk of the court may be reviewed as to its reasonableness by the judge on appeal, and *held* under the circumstances of this appeal, the commission of 5 per cent was not unreasonable.

APPEAL by the Bank of Edenton from a judgment of *Clayton Moore, Special Judge,* rendered at chambers 15 June, 1927. From CHOWAN. Affirmed.

W. D. Pruden for the appellant.
Worth & Horner for the appellee.

ADAMS, J. On 1 October, 1923, E. Hollowell and his wife executed and delivered to the Southern Trust Company, as trustee, a deed of trust on certain property to secure a note for $1,235.30, providing that after paying all expenses attending the execution of the trust, including a commission on the proceeds of the sale at the rate of 5 per cent, the trustee should pay the secured debt and should deliver the remainder of the proceeds, if any, to the grantors or their assigns. After due advertisement the trustee offered the property for sale on 30 December, 1926, and D. M. Warren became the last and highest bidder therefor at the price of $3,000. On 7 January, 1927, the bid was raised and a resale was ordered by the clerk. The second sale was made on 24 January, 1927, D. M. Warren again making the highest bid, which was $3,475. The clerk confirmed the sale on 5 February, 1927. The trustee thereafter made his deed to the purchaser and filed his account showing payment of the secured note ($1,235.30) and other disbursements, the retention of a commission of 5 per cent on the proceeds of the sale, and the payment to the clerk of $1,965.90. On 28 January, 1927, E. Hollowell confessed judgment in favor of the Bank of Edenton for $345.69 and costs, waived all claims to exemptions, and requested the clerk to pay over to his creditors any part of the proceeds to which he was entitled. The judgment was docketed in the Superior Court. Certain judgments and mortgages which had priority were paid and the remainder was not sufficient to satisfy the amount due the Bank of Edenton. The bank made a motion before the clerk to reform the trustee's account by allowing a commission only on the amount secured by the deed of trust. The motion was denied, and on appeal the judge affirmed the judgment of the clerk and taxed the Bank of Edenton with payment of the cost. Whether there was error in allowing the commission is the point raised by the appeal.

Among the cases in which the question is discussed is *Howell v. Pool,* 92 N. C., 450. Howell borrowed of the defendant $2,500, gave his bond therefor, to be due twelve months after date, bearing interest at 8 per cent, payable semi-annually, and executed a mortgage signed by his wife conveying to the defendant as security a lot in the city of Raleigh and vesting in the mortgagee a power of sale in case of default. Following stipulations for the mortgagor's payment of taxes and for insurance against loss by fire was the following clause: "And out of the moneys arising from such sale to retain the principal and interest which shall then be due on said mortgage, together with all costs and charges, including a commission of 5 per cent for making such sale." The debt was not paid at maturity and the mortgagee advertised the property. The plaintiff brought suit to enjoin the sale, setting up usury, defect in the notice of sale, together with other matters, and attacking the clause providing for the mortgagee's compensation. In reference to this clause the Court said: "As the matter has now passed under the jurisdiction of the court, and the sale, if necessary, will be conducted by a commissioner under its supervision, the inquiry as to the effect of this clause of the deed is immaterial, as the court will make such allowance as it deems reasonable and adequate for the service rendered. . . . There can be no litigation about the provision for compensation to the mortgagee for making the sale, since it will be made, if at all, under the direction of the court by one of its own appointees, for whose services allowance may be made by the court."

In *Banking Co. v. Leach,* 169 N. C., 706, it was held that in the absence of any such element as usury, fraud, undue influence, or oppression the courts have no jurisdiction to set aside the written agreement of the parties as to the trustee's compensation when the sale is made under the power conferred in the deed of trust without any order or direction of the court.

The appellant cites *Pringle v. Loan Asso.,* 182 N. C., 316, as an expression of this Court's opinion that the statute (C. S., 2591) was intended to limit the compensation of the trustee to a commission on the amount collected and paid on the secured debt, in analogy to the sale by a sheriff under execution or by an administrator under a decree to make assets. The question, however, was not presented for decision, and the dictum or suggestion referred to seems not to be in accord on this point either with *Howell v. Pool, supra,* or with *Banking Co. v. Leach, supra.* In the decision appear these two statements: (1) "In the present case the matter being before the clerk under C. S., 2591, by virtue of the order of sale made by him, we are of opinion that these charges can be assessed by the clerk, subject to review on appeal, or by the judge in this proceeding, as in *Fry v. Graham, supra.*" (2) "The decisions upon the right of the commissioner to commissions on a sale under a decree of foreclosure is applicable in these cases," *i. e.,* to sales by a mortgagee or trustee under a power of sale on a raised bid. The "charges" referred to in the first proposition were an allowance to the trustee for time, labor, services, and expenses, not including the stipulated commission, because upon tender of the amount due on the note and the cost of advertising, the sale had been enjoined. *Smith v. Frazier,* 119 N. C., 157. In the case at bar the trustee, pursuant to an order of resale, sold the property and executed his deed to the purchaser. There was therefore no occasion for an allowance of "charges," as if settlement between the parties had been brought about pending the controversy and no sale of the property had been made. But the statute provides that after final sale of the land and the trustee's conveyance of title to the purchaser, the clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties, and he shall keep a record which shall show in detail the amount of each bid, the purchase price, and the final settlement between the parties. C. S.,

2591. In *Pringle's case* the Court, in an opinion written by *Clark, C. J.,* construed this statute as importing that the condition of a mortgagor who has executed a mortgage with a power of sale is assimilated to the condition of property sold under a decree of foreclosure so far as the clerk's right to set aside the bid at the first sale and to order a resale is concerned, and as stated above that the right to commissions is to be determined in such instance by decisions regulating commissions on a sale by virtue of a decree of foreclosure. Under this interpretation the principle in *Howell v. Pool, supra,* applied, and the clerk had jurisdiction to allow such commissions as were reasonable and adequate for the service rendered. In effect he allowed the trustee a commission of 5 per cent on the proceeds, and on appeal the judge found as a fact that this amount, less certain payments made by the trustee, was a reasonable compensation. For this reason the judgment should be affirmed. As to the appellant, the result would be the same if the transaction were treated as a sale under the express agreement of the parties as to the compensation to be given the trustee.

Affirmed.

JULIAN C. NIXON v. W. J. MORSE.

(Filed 14 September, 1927.)

Partnership—Actions—Accounting—Adjustment.

One partner cannot maintain an action against his copartner for an indebtedness growing out of the relationship of partnership, unless there has been a settlement between them of the partnership business or some sufficient accounting or adjustment by which to determine their respective liability.

APPEAL by plaintiff from *Daniels, J.,* at March Term, 1927, of CURRITUCK. No error.

Action to recover upon notes executed by defendant, payable to the order of Richardson-Nixon Company, and upon an account for advancements made by said company to defendant. At the date of said notes and advancements, the Richardson-Nixon Company was a partnership, engaged in business in the city of Norfolk, Va.

Plaintiff alleges that he is the owner of said notes by endorsement, and of said account by assignment made to him by said company, upon its dissolution.

Defendant alleges that he and plaintiff were partners under the firm name and style of Richardson-Nixon Company; that the notes and account sued upon are part of the assets of said partnership, and that the affairs of said partnership have not been adjusted or settled. He alleges that said partnership is indebted to him, and sets up said indebtedness as a counterclaim against plaintiff.

Plaintiff, in his reply, denies that defendant was at any time a member of the firm doing business as Richardson-Nixon Company; he also denies that said partnership is indebted in any sum to defendant.

The issues were answered by the jury as follows:

1. Were plaintiff and defendant partners in the Richardson-Nixon Company, as alleged in the answer? Answer: Yes.

2. Is the defendant indebted to plaintiff as alleged in the complaint, and if so, in what amount? Answer: No.

3. Is plaintiff indebted to defendant as alleged in the answer, and if so, in what amount? Answer: No.

From judgment upon the verdict, plaintiff appealed to the Supreme Court.

McMullan & LeRoy for plaintiff.
Ehringhaus & Hall for defendant.

PER CURIAM. Plaintiff's assignments of error upon his appeal to this Court cannot be sustained.

The jury has found that plaintiff and defendant were partners under the firm name and style of Richardson-Nixon Company. The notes sued upon, executed by defendant, were payable to the order of the partnership; the advancements were made by the partnership to defendant. Both the notes and the account for advancements are assets of the partnership. Neither plaintiff nor defendant can maintain an action against the other for the recovery of partnership assets. There has been no settlement of the partnership business. The claims of plaintiff and defendant, growing out of their dealings with the partnership, have not been adjusted. There has been no accounting between the partnership and its members, in order to determine their respective rights in and to the partnership assets.

The judgment is affirmed. There is
No error.

A. B. JONES v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 21 September, 1927.)

1. **Master and Servant—Employer and Employee—Safe Place to Work—Negligence.**

An employer is required to use ordinary care under the conditions existing to furnish his employee a reasonably safe place to do the work required of him in the course of his employment, and proper tools and appliances with which to do it.

2. **Same—Railroads—Evidence—Nonsuit—Questions for Jury—Statutes.**

Where there is evidence that it is the custom of a railroad company to furnish ladders to painters employed to paint its station house, and that one of them so employed had not been furnished with a proper ladder with hooks or with a certain ladder called a "chicken-ladder," but with an ordinary ladder that extended beyond the steep roof of the building upon which he was at work bending down and painting below the eaves of the roof, and that the ladder so furnished fell over and struck the plaintiff, causing him to fall about twelve feet to the ground below, causing the injury in suit, and that the injury would not have occurred if a proper ladder or appliance under the circumstances had been furnished: *Held*, sufficient to take the case to the jury upon the issue of the defendant's actionable negligence. C. S., 3466.

3. **Same—Contributory Negligence—Damages.**

Held, that where the failure of a railroad company to furnish an employee engaged in the scope of his employment in painting a station house, a proper ladder or appliance which caused the injury in suit, comes within the provisions of C. S., 3467, and the contributory negligence of the plaintiff is not a complete bar to his recovery, but only to be considered *pro tanto* by the jury in diminution of the damages recoverable for a personal injury thus received by him.

4. **Evidence—Act of God—Accident—Negligence — Nonsuit — Questions for Jury—Statutes.**

Where in a personal injury negligence case there is evidence for defendant that the injury in suit was caused either by the act of God, etc., or by an accident, and, *per contra*, that it was proximately caused by the defendant's negligence in the exercise of ordinary care to furnish the plaintiff, his employee, a reasonably safe place to work or reasonably safe appliances under the circumstances, defendant's motion as of nonsuit will be denied. C. S., 567.

5. **Instructions—Inadvertence—Corrections—Appeal and Error — Harmless Error.**

Where the trial judge correctly instructs the jury upon the evidence in the case, it will not be held reversible error for an erroneous inadvertence of the judge which he afterwards corrects in his charge.

APPEAL by defendant from *Nunn, J.*, at June Term, 1927, of EDGECOMBE. No error.

Action to recover damages resulting from personal injuries sustained by plaintiff while performing his duties as an employee of defendant.

Plaintiff, while painting the roof of a section house owned by defendant, was struck and knocked off the roof by a ladder, upon which he had gone up on said roof. This ladder was furnished by defendant to plaintiff to be used by him in going up on and coming down from the roof. The ladder, while resting on the eaves of the house, extending about five feet above the same, slipped, struck plaintiff, who at the time was painting near the eaves, and knocked him from the roof to the ground, a distance of twelve feet. Plaintiff thereby sustained serious and permanent injuries.

The issues were answered by the jury as follows:

1. Was the plaintiff injured by the negligence of defendant as alleged? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his injuries as alleged? Answer: Yes.

3. What damages, if any, is plaintiff entitled to recover of defendant? Answer: $900.

From judgment on this verdict defendant appealed to the Supreme Court, assigning as error, chiefly, the refusal of the court to allow its motions for judgment as of nonsuit. C. S., 567.

B. E. Fountain, R. T. Fountain and George M. Fountain for plaintiff.
Spruill & Spruill and Gilliam & Bond for defendant.

CONNOR, J. On 26 February, 1925, plaintiff was at work painting the roof of a section house owned by defendant at Hobgood, N. C. Defendant is a common carrier by railroad. While engaged in the performance of his duties as an employee of defendant, plaintiff was struck by a ladder, which had been resting upon the eaves of the roof, extending about five feet above the same. Plaintiff was at work near the eaves, within reach of the ladder. The ladder suddenly slipped, struck plaintiff and knocked him off the roof. This ladder had been furnished by defendant to plaintiff to enable him to go up and to come down from the roof. There were no hooks or other means by which the ladder could be fastened to the house, or made secure. The roof was covered with tin and had a slant of at least four inches to the foot. No appliance or other equipment was furnished by defendant to enable plaintiff to hold on or steady himself while working on the roof. Plaintiff suffered serious and permanent injuries caused by his fall from the roof to the ground, a distance of twelve feet.

Plaintiff alleges that he was injured by reason of a defect or insufficiency, due to defendant's negligence, in the appliances and equipment furnished by the defendant to the plaintiff to enable him to do his work, in that there were no hooks upon the ladder by which it could be fastened to the weather-boarding of the house, and thus made secure. He further alleges that defendant negligently failed to furnish him appliances and equipment by which he could hold on and steady himself while at work on the roof. He alleges that his injuries were caused by the negligence of defendant with respect to the place at which, and the appliances and equipment with which he was required to work. He therefore contends that defendant, his employer, a common carrier by railroad, is liable to him for damages, resulting from his injuries, caused by the fall from the roof. C. S., 3466.

The fact that plaintiff was guilty of contributory negligence, as alleged by defendant in its answer, and as found by the jury, does not bar his recovery; its only effect is to diminish the amount of his damages caused by the negligence of defendant, in proportion to the amount of negligence attributable to him. C. S., 3467. The only question, therefore, presented by defendant's assignment of error based upon its exception to the refusal of its motion for judgment as of nonsuit (C. S., 567) is whether there is evidence from which the jury can find that plaintiff was injured by the negligence of defendant as alleged in the complaint.

There was evidence tending to show that the roof which plaintiff was directed by his foreman to paint, was about twelve feet from the ground at the eaves; that plaintiff was furnished by defendant with a ladder to be used by him in going up on and coming down from the roof; that this ladder was about twenty feet long, and was so placed that it rested on the ground and extended about five feet above the eaves of the roof where plaintiff was at work; that there were no hooks or other means by which this ladder could be fastened to the weather-boarding of the house and thus made secure. While plaintiff was at work on the roof, near the eaves, leaning over and painting, the ladder suddenly slipped, struck the plaintiff and knocked him off the roof to the ground. Plaintiff testified that if the ladder had been fastened to the weather-boarding of the house by hooks, as it rested on the eaves of the roof, it would not have slipped and knocked him off the roof.

There was evidence tending to show further that the roof which plaintiff was painting at the time he was struck by the ladder was covered with tin; that it was a steep roof, with a slant from the eaves to the comb, in excess of four inches to the foot; that no appliance or equipment, such as a "chicken ladder" was furnished by defendant to enable plaintiff, while at work, to hold on and steady himself. Plaintiff testified that if he had had a roof or "chicken ladder," such as is usually furnished to and used by painters, when painting upon a steep roof, he would not have been knocked off the roof when the ladder, resting upon the eaves, slipped and struck him.

There was evidence also tending to show that it is customary for employers to furnish painters who are required to go upon and paint roofs, a ladder equipped with hooks by which the ladder, while resting on the eaves of the roof, may be fastened to the weather-boarding of the house and thus made secure; that when the roof is steep, it is customary for the employer to furnish a roof or "chicken ladder" upon which the painter stands while at work and to which he can hold, and thus steady himself, and that if defendant had furnished plaintiff, while he was at work on the roof of the section house at Hobgood, N. C., on 25 February, 1925, ladders such as are customarily and usually furnished to painters when painting a steep roof, plaintiff would not have been knocked off the roof and injured, as the evidence tended to show he was.

Defendant contends that the evidence shows that the ladder was upset by a strong wind which arose suddenly and blew the ladder against the plaintiff; that plaintiff's injury was caused by an accident which it could not have foreseen, or by an act of God for which it was not liable. However, there is evidence from which the jury may find that, notwithstanding the wind, the ladder would not have been upset, if it had been fastened to the weather-boarding by hooks, or other means, and that even if it had been upset by the wind, it would not have knocked plaintiff off the roof, if he had had an appliance or equipment, such as a "chicken ladder," as described by the witnesses, upon which to hold while he was at work on the roof.

There is concededly a conflict in the evidence as to whether or not it is customary for painters to use ladders with hooks attached, by which they can be fastened to the weather-boarding of the house, to go up on and come down from a roof such as plaintiff was painting at the time he was injured, and also as to whether or not the roof upon which he was at work was sufficiently steep to require the use of a "chicken ladder"; however, there was sufficient evidence to sustain the allegations and contentions of plaintiff. There was no error in submitting all the evidence to the jury, under proper instructions as to the law applicable to the facts as the jury might find them to be from the evidence. There was no exception to the charge of the court upon either the first or second issue.

It has been repeatedly declared to be the law that while a master does not insure the safety of his servant, nor the employer the safety of his employee, he owes his servant or employee the duty, which he neglects at his peril, to furnish proper tools and appliances to his servant or employee with which to do his work. *Reid v. Rees,* 155 N. C., 230. This principle of the law of negligence, as applicable to the relation of master and servant, of employer and employee, is so elementary and so familiar that no citation of authorities can be necessary. Where the master or employer is, as in this case, a common carrier by railroad, his liability is fixed by statute, and defenses ordinarily available do not bar a recovery.

The error which the court inadvertently made in the charge upon the third issue was subsequently corrected. The assignment of error based upon the exception to this charge cannot be sustained. The jury were correctly and clearly instructed as to the effect of an affirmative answer to the second issue upon the damages which plaintiff was entitled to recover, upon an affirmative answer to the first issue.

No error.

VIRGINIA-CAROLINA POWER COMPANY v. JOB TAYLOR.

(Filed 21 September, 1927.)

1. **Appeal and Error—Trials—Burden of Proof—Reversal.**

   Where a party to a civil action has the burden of proof of the issue, it is a substantial right of the other party accorded him by the law, and the erroneous placing of this burden by the trial court is reversible.

2. **Ejectment—Title—Defenses—Adverse Possession—Burden of Proof—Appeal and Error—New Trials.**

   The burden of proving title by sufficient adverse possession is on the defendant in ejectment relying thereon, and where the evidence of the plaintiff has tended to show a perfect chain of paper title, the defendant's title is deemed to be in subordination thereto, C. S., 432, and it is reversible error for the trial judge in effect to instruct the jury that the burden of disproving the defendant's evidence is on the plaintiff.

APPEALS by plaintiff and defendant from *Grady, J.,* at April Term, 1927, of NORTHAMPTON.

Civil action in ejectment to recover possession of a tract of land located in the bed of Roanoke River, a non-navigable stream.

Upon issues raised by denial of plaintiff's title and claim of ownership by adverse possession on the part of the defendant, the jury returned the following verdict:

"1. Is the plaintiff the owner of and entitled to the possession of the tract of land described in the complaint, being the bed of Roanoke River south of the thread thereof as indicated on the plot? Answer: No.

"2. Has the plaintiff, or those under whom it claims, been possessed of said land within twenty years before the commencement of this action? Answer: No."

Plaintiff alleges error in the following instruction relative to the burden of proof:

"And so, gentlemen, if you find in this case, from the evidence offered, that the defendant, Job Taylor, and those under whom he claims title, have been in the possession of these particular lands, the lands in controversy which are shown within the red lines on that map, for twenty years prior to 1921, as alleged in his answer, holding the same as their own, and that such possession was characterized by the qualities to which I have just called your attention, then, gentlemen, I charge you the said lands would belong to the defendant, and it would be your duty to answer both of these issues No. On the other hand, if the plaintiff has satisfied you by the greater weight of the evidence that the chain of title offered in evidence covers these lands in controversy, and that such chain is connected back to the grant of 1790, and it further satisfies you by the greater weight of the evidence that it and those from whom it acquired title have been in the possession of the said lands at any time within twenty years prior to 1921, or since 1901, such possession coming within the definition that I have given you, it would be your duty to answer both of these issues Yes; otherwise, answer them No."

Upon the coming in of the verdict defendant moved for judgment, which was refused. Defendant excepted. His Honor then set aside the verdict, not as a matter of discretion, but for errors committed in the trial of the cause, mentioning especially his ruling in holding void, or merely as color of title, a grant issued to William Eaton in 1790, under which the plaintiff claims. Defendant again excepted and appealed. The plaintiff also appeals, bringing up other exceptions in support of the action of the court in setting aside the verdict of the jury as a matter of law.

George C. Green for plaintiff.

Travis & Travis, Burgwyn & Norfleet and Charles R. Daniel for defendant.

STACY, C. J. The two appeals present the same questions for review, hence, they will be considered together. The case has been tried three times in the Superior Court, and this is the third appeal here. See former opinions, as reported in 191 N. C., 329, and 188 N. C., 351, for fuller statement of the facts. Its only rival among the more recent decisions seems to be the quadruply tried ejectment suit of *Taylor v. Meadows,* 186 N. C., 353; 182 N. C., 266; 175 N. C., 373; 169 N. C., 124.

We would not permit the case to go back for another hearing if the verdict could be reinstated without doing violence to settled principles of law. *Burris v. Litaker,* 181 N. C., 376. Verdicts and judgments are not to be set aside for harmless error, or for mere error and no more. *S. v. Beam,* 184 N. C., 730. Appellate courts will not encourage litigation by reversing judgments for slight error, or stated objections, which could not have prejudiced the rights of the complaining party in any material way. *In re Ross,* 182 N. C., 477. New trials are awarded for erroneous rulings only when such rulings are material or prejudicial in a legal sense. *In re Edens,* 182 N. C., 398.

Notwithstanding these established rules of procedure, which we are required to observe, still we are unable to reverse the judgment and reinstate the verdict in the face of the above exception to the charge on the burden of proof. It is uniformly held that the rule as to the burden of proof is important in the trial of causes, and that it constitutes a substantial right of the party upon whose adversary the burden rests. *Hosiery Co. v. Express Co.,* 184 N. C., 480. A similar charge was held for error in *Land Co. v. Floyd,* 171 N. C., 543. There it was said that when the plaintiff in ejectment shows title to the premises, and the defendant claims title by adverse possession, the latter must establish such affirmative defense by the greater weight of the evidence, otherwise the defendant's occupation is deemed to be under and in subordination to the legal title. C. S., 432. It is not like meeting a prima facie case under a general denial, or plea in bar, by offering evidence of equal weight so as to balance the scales, or put the case in equipoise, but where an affirmative defense is set up, as here, the defendant must establish his allegations by the same degree of proof as would be required if he were plaintiff in an independent action. *Speas v. Bank,* 188 N. C., p. 531.

True, in ejectment, the plaintiff must rely for a recovery upon the strength of his own title, and not upon the weakness of his adversary's. *Rumbough v. Sackett,* 141 N. C., 495. To recover in such action, the plaintiff must show title good against the world, or good against the defendant by estoppel. *Mobley v. Griffin,* 104 N. C., 112. It can make no difference in ejectment whether the defendant has title or not, the only inquiry being whether plaintiff has it, and upon this issue the plaintiff has the burden of proof. *Timber Co. v. Cozad,* 192 N. C., 40; *Pope v. Pope,* 176 N. C., 283. But when the plaintiff has established a legal title to the premises, and the defendant undertakes to defeat a recovery by showing possession, adverse for the requisite period of time, either under or without color of title, the defense is an affirmative one in which the defendant *pro hac vice* becomes plaintiff, and he is required to establish it by the greater weight of the evidence. *Bryan v. Spivey,* 109 N. C., 57; *Ruffin v. Overby,* 105 N. C., 78.

This is not placing the burden of proof on both parties at the same time, for such would be an anomaly in the law (*Speas v. Bank,* 188 N. C., p. 529), but it is simply requiring the actor in each instance, while occupying that position, to handle the laboring oar. Perhaps it should be observed that the defendant is not required to come forward with evidence of adverse possession, unless and until the plaintiff has shown a legal right to the premises. Then, in order to defeat the plaintiff's claim, the defendant must establish his affirmative defense, if such it be, as it is in the instant case, by the greater weight of the evidence.

The case is not like a special proceeding to establish the dividing line between adjoining landowners, where the plaintiff alleges the line to be at one place and the defendant at another. This is only a denial of the plaintiff's claim, though the defendant alleges another to be the dividing line. *Garris v. Harrington,* 167 N. C., 86. There can only be one true dividing line between two tracts of land, and upon the reason of the thing the burden of proof cannot rest on both parties at the same time to establish this line. *Carr v. Bizzell,* 192 N. C., 212; *Tillotson v. Fulp,* 172 N. C., 499; *Woody v. Fountain,* 143 N. C., 66.

The ruling in regard to the William Eaton grant seems to be without material significance on the record.

Affirmed.

MYRTLE HANIE, ADMINISTRATRIX, v. JOE RICE AND B. H. PENLAND.

(Filed 21 September, 1927.)

Sheriffs—Special Deputies—Principal and Agent—Damages—Respondeat Superior—Criminal Law—Homicide—Accident.

The civil liability of a sheriff for the accidental killing of a bystander by his special deputy while attempting to arrest one for the violation of the criminal law, by shooting at and missing the supposed but unidentified offender under a John Doe warrant, depends upon the question as to whether the special deputy was acting officially at the time within the authority deputized, and where the evidence discloses only that he had been appointed a special deputy without defining his duties, and had sworn out the warrant in his own name, and was acting without the knowledge of the sheriff, and the killing happened to a bystander in attempting to make the arrest, it is not sufficient to make the sheriff liable in damages therefor. The authority of a sheriff to appoint deputies and their powers stated by BROGDEN, J.

PETITION to rehear. This was a civil action, tried before *Schenck, J.*, at November Term, 1926, of BUNCOMBE.

The plaintiff is the duly appointed administratrix of Garfield Hanie, her husband, who was killed by the defendant Joe Rice on or about 7 April, 1924. The plaintiff further alleged and offered evidence tending to show that Joe Rice was a special deputy of the defendant, D. H. Penland, sheriff of Buncombe County; that on or about 6 April, 1924, the said Joe Rice went to the office of B. L. Lyda, a justice of the peace of Asheville, and made an affidavit, upon oath, that one .... did unlawfully, etc., maintain and set up a gambling board, to wit, "a punchboard," etc. Thereupon, on 6 April, 1924, the said justice of the peace issued a warrant directed "to any constable or other lawful officer of Buncombe County, commanding the arrest of 'John Doe, alias.' " Thereafter, on 7 April, 1924, the said Joe Rice, special deputy, went to Woodfin, on the Weaverville road, and saw a man who he was informed was the "punchboard man." This unidentified person got in his car and started to move off. Rice jumped on the running board. The occupant of the car either pushed Rice off the car or Rice got off, and thereupon drew his pistol and began to fire at the car. Garfield Hanie, plaintiff's intestate, passed by the side of the car at that time and was shot by the defendant Rice and killed. It does not appear who the occupant of the car was, or whether he was the "punchboard" man or not. Garfield Hanie, plaintiff's intestate, was an innocent bystander, and had no connection whatever with the transaction. The defendant Rice contended that the shooting of Hanie was an accident. However, he filed no answer, and judgment was taken against him by default. The cause of action alleged by plaintiff against defendant Penland is based upon the theory that the sheriff is responsible for the negligence of his deputies.

The foregoing cause was decided and an opinion delivered by the Court on 25 May, 1927, and reported in 193 N. C., p. 800. The record, as presented to the Court, showed upon its face that the suit had not been brought within one year after the cause of action accrued, and for this reason the Court sustained a judgment of nonsuit entered by the lower court. The parties filed a petition to rehear from which it appears, by consent of the parties, that a former suit had been instituted by the same parties in the Superior Court of Buncombe County and a nonsuit taken, and that the present suit was brought within the time required by statute, and that "by inadvertence the original or first summons and judgment of nonsuit was omitted from the record on appeal to the Supreme Court." In pursuance of such consent by all parties, amending the record as aforesaid, the case is reconsidered.

W. R. Gudger and Zeb F. Curtis for plaintiff.
A. Hall Johnston for defendant Penland.

BROGDEN, J. What is the law with reference to the civil liability of a sheriff for the unlawful killing of a third party by a special deputy in attempting to make an arrest?

"Deputy sheriffs are of two kinds: (a) A general deputy, or under-sheriff, who, by virtue of his appointment, has authority to execute all the ordinary duties of the office of sheriff (Com. Dig. tit. 'Viscount,' 542, B. 1); one who executes process without special authority from the sheriff, and may even delegate authority in the name of the sheriff, or its execution, to a special deputy. (b) A special deputy, who is an officer *pro hac vice* to execute a particular writ on some certain occasion, but acts under a specific and not a general appointment and authority." *Allen, J.,* in *Lanier v. Greenville,* 174 N. C., 316. In *R. R. v. Fisher,* 109 N. C., p. 1, the law is thus stated: "The right to appoint under-sheriffs or bailiffs and deputies is not always, if generally, regulated by statute. These subordinates are the servants and agents of the sheriff, and his responsibility for them and relations with them are controlled, generally, by the law governing the relation of principal and agent. While public policy may have induced the Courts to hold his responsibility in some instances to be greater, never less, than that of a principal, for the acts of his agent within the scope of the agency, our Code is still silent as to the manner of appointment or the distinct duties of both general and special deputies, while this Court has declared that there is no provision of the common law which requires the deputation of a sheriff to be in writing, and that in any action against a sheriff, for the misconduct of a person alleged to be his deputy, it is not necessary to prove a deputation, but it is sufficient simply to show that the person acted as deputy with the consent or privity of the sheriff." The principle is referred to in several cases in this State. *S. v. Fullenwider,* 26 N. C., 364; *S. v. Allen,* 27 N. C., 36; *Patterson v. Britt,* 33 N. C., 383; *S. v. McIntosh,* 24 N. C., 53; *Eaton v. Kelly,* 72 N. C., 110.

The paramount question in determining the civil liability of a sheriff for the misconduct of a special deputy, depends upon whether or not the special deputy was acting within the scope of his authority, or whether or not the act was the official act of the special deputy sheriff. In *Jones v. Van Bever,* 164 Ky., 80 L. R. A. (1915 E.), 172, the test in determining whether the act complained of was such an official act as to impose liability upon the sheriff is thus stated: "It will thus be seen that the test as to whether the officer is acting by virtue of his office is whether he is either armed with a valid writ, or had authority to make the arrest without a writ, under a statute. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is, at the time, no statute which authorizes the act to be done without a writ, then the officer is not acting by virtue of his office." The authorities relating to the subject are arrayed and reviewed in the foregoing case. See, also, *Adkins v. Camp,* 105 Southern, 877; *Miles v. Wright,* 12 A. L. R., 970; *Jordan v. Neer,* 125 Pac., 1117; *Brown v. Wallis,* 12 L. R. A. (N. S.), 1019; *Mead v. Young,* 19 N. C., 521.

Applying the test deduced from the authorities to the case now under consideration, it appears that Rice was a special deputy of Sheriff Penland. It does not appear what his duties were as such special deputy. It further appears that special deputy Rice, without the knowledge, suggestion or direction of the sheriff, voluntarily went to a justice of the peace and procured a blank warrant or a "John Doe" warrant. The affidavit upon which he procured the warrant was signed by him in his individual capacity. The affidavit did not name any particular person. The warrant issued by the justice of the peace was directed "to any constable or other lawful officer of Buncombe County," commanding such officer "to arrest John Doe, alias," etc. It does not appear that any complaint had ever been made to the sheriff about the violation of the law complained of, or that he authorized or consented to the issue of the warrant, or that he knew anything at all about it.

Upon the evidence contained in the record we are of the opinion that the special deputy was not acting in the line of his duty, or within the scope of his authority as such, nor was he acting by virtue of his office or under color thereof, but entirely and exclusively as a volunteer, and therefore the defendant sheriff is not liable for the injury complained of.

Affirmed.

GEORGE E. RANSOM v. BOARD OF COMMISSIONERS OF WELDON ET AL.

(Filed 21 September, 1927.)

Taxation—Intangible Property—Where Payable—Residence—Domicile.

Under the provisions of C. S., 7912, where a person has not resided in the place of his domicile, his solvent credits and intangible property should be listed for taxation and are payable at the place in which he has dwelt for the longest period of time during the year preceding the first of May, and where the fact is established that he has dwelt for fourteen continuous years preceding that date in a county different from his domicile, his taxes for such property are properly listed and payable in the former place.

APPEAL by plaintiff from *Grady, J.,* at March Term, 1927, of HALIFAX.

Civil action to restrain the defendants from placing on the tax books of the town of Weldon, and collecting taxes thereon, solvent credits and intangible personal property listed by the plaintiff for taxation in Northampton County, the county of his domicile, during the years 1919 to 1925, but not listed for taxation during said years in Halifax County, the county of his residence.

From a judgment in favor of defendants, the plaintiff appeals, assigning errors.

Travis & Travis and Elliott B. Clark for plaintiff.
George C. Green and Daniel & Daniel for defendants.

STACY, C. J. Plaintiff was born in Northampton County, this State, and it is established by the verdict that he is still domiciled in said county, but he has actually resided in the town of Weldon, Halifax County, N. C., continuously since 1912 or 1913. Plaintiff is 57 years old, unmarried, and lives in a hotel in said town.

The appeal presents the single question as to whether intangible personal property is required to be listed for taxation in the county of one's residence or in the county of his domicile, where the two are different.

Ordinarily, a man's residence and his domicile are at the same place, *i. e.,* he usually resides at his domicile. *Reynolds v. Cotton Mills,* 177 N. C., 412, and cases there cited. It is only when a person has a domicile in one place and resides in another that the distinction between the two becomes important. We are not now concerned, however, with the indicia which distinguish the one from the other, as the fact situation of domicile in one county and residence in another is established by the record. *Roanoke Rapids v. Patterson,* 184 N. C., 135.

It is provided by C. S., 7912, that "all taxable polls and all personal property shall be listed in the township in which the person so charged resides on the first day of May" (with certain exceptions not presently material), and the "residence of a person who has two or more places in which he occasionally dwells shall be that in which he dwells for the longest period of time during the year preceding the first day of May."

It is found by consent that the plaintiff resides in the town of Weldon and has so resided for the last fourteen or fifteen years, hence, his solvent credits and intangible personal property, the subject of the present litigation, have properly been listed for taxation by the defendants at the place of his residence. This was the holding of the court below, and we affirm the judgment. No point is made of the fact that Halifax County is not a party to the proceeding.

Affirmed.

NORTH CAROLINA CORPORATION COMMISSION v. MARTIN COUNTY SAVINGS AND TRUST COMPANY.

(Filed 21 September, 1927.)

Banks and Banking—Receivers—Trust Funds—Priorities—Parties—Appeal and Error.

The surety on the bond of guardians, etc., who have deposited moneys in a bank since becoming insolvent, may not alone successfully petition the court in proceedings for dissolution of the bank brought by the Corporation Commission to have the funds so deposited declared a preference to the general creditors, and have the receiver accordingly pay them, without making the guardians, etc., parties to the proceedings, there being otherwise a want of necessary parties to the determination of the matter.

APPEAL by R. L. Coburn, receiver, from *Nunn, J.*, at June Term, 1927, of MARTIN.

The National Surety Company filed a petition and motion in the above cause, asking that the receiver of the Martin County Savings and Trust Company be directed to pay in full the claims of certain guardians, receivers and administrators, out of moneys in the hands of the receiver, alleging that said claims were entitled to a preference over general creditors.

From an order directing the payment in full of said specified claims in preference to the claims of general creditors, the receiver appeals, assigning error.

S. Brown Shepherd and James E. Shepherd for petitioner, National Surety Company.

Wheeler Martin for "certain fiduciary claimants."

B. A. Critcher and A. R. Dunning for R. L. Coburn, receiver, appellant.

STACY, C. J. It may fairly be assumed from the title of the cause, though no definite statement to the effect appears on the record, that a proceeding by the North Carolina Corporation Commission against the Martin County Savings and Trust Company, to wind up the affairs of an insolvent bank, is pending in the Superior Court of Martin County. In this proceeding, it seems, the National Surety Company, being surety on the bonds of certain guardians, receivers and administrators, filed an unverified petition and motion in the cause, asking that the claims of these fiduciaries, arising from deposits had in said bank at the time of its failure, be paid in full before the claims of other creditors, as they are entitled, so petitioner alleges, to priority and preference in the distribution of the assets of said company.

It is not alleged that the National Surety Company would be liable for the payment of said claims in the event they are not paid by the receiver, and it is observed that the fiduciaries do not join in this request, doubtless for the reason that their interests and the interests of their surety may not in this respect be identical. True, counsel for petitioner and counsel "for certain of the fiduciary claimants," not named on the record, join in a single brief, filed in this Court, but we find no order making any of the fiduciary claimants parties of record, nor have they filed any pleading in the cause. Furthermore, it is not alleged that the receiver will be unable to pay all the creditors in full, though this may be taken for granted, perhaps. At any rate, for lack of proper parties and sufficient interest shown upon the record, we think the court erred in directing preferential payment of these claims. For like reason, we do not pass upon the merits of the question. The receiver was properly advised in appealing from the order.

Error.

SLADE RHODES & COMPANY v. W. C. JAMES AND WIFE.

(Filed 21 September, 1927.)

Agriculture—Liens—Advancements—Statutes—Overcharge—Reference—Evidence—Findings—Appeal and Error—Remand.

In an action to recover the balance due a cropper for advancements made for the cultivation of the crop and to establish the lien provided by C. S., 2480, and referred, the referee found as a fact, that the advancements were in money, merchandise and fertilizer, that the plaintiffs had charged more than 10 per cent above the retail cash price for fertilizer of the same kind, and declared the statutory lien void under the provisions of C. S., 2483: *Held,* the action of the trial judge was erroneous in the absence of evidence that such advance price had been charged for the fertilizer, or that if otherwise the lien would necessarily be void as to the other merchandise sold.

APPEAL by plaintiffs from *Nunn, J.,* at June Term, 1927, of MARTIN. Error and remanded.

Action to recover balance due on account for advancements, and to enforce liens executed by defendants in accordance with the provisions of C. S., 2480, to secure said advancements.

From judgment upon facts found by the referee, and in accordance with his conclusions of law thereon, plaintiffs appealed to the Supreme Court.

B. A. Critcher and A. R. Dunning for plaintiffs.
No counsel for defendants.

CONNOR, J. This action was referred, by consent, to a referee for trial. It was heard in the Superior Court upon the report of the referee. Exceptions to said report filed by plaintiffs were not sustained. The report was confirmed, and from judgment in accordance therewith, plaintiffs appealed to this Court.

The referee finds that defendants are indebted to plaintiffs in the sum of $354.53, with interest thereon from 1 November, 1925. This amount is the balance due on an account for advancements made by plaintiffs to defendants, during the year 1925, to enable defendants to cultivate and harvest crops upon their lands in Martin County during said year. There is no exception, by either plaintiffs or defendants, to the judgment, for that it is adjudged therein that plaintiffs recover of defendants said sum, interest and costs.

The referee finds that during the year 1925 defendants executed agricultural liens, in accordance with the provisions of C. S., 2480, to secure plaintiffs' account for said advancements. He further finds that plaintiffs charged defendants for fertilizer sold to them as part of said advancements, a price greater than 10 per cent above the cash price charged by plaintiffs for the same kind of fertilizer.

Upon said findings of fact the referee reported as his conclusion of law that the agricultural liens which plaintiffs seek to enforce by this action are null and void. C. S., 2481.

By their exception to the judgment confirming the report of the referee, and declaring that the agricultural liens executed by defendants are null and void, plaintiffs upon their appeal to this Court present their contentions (1) that there was no evidence to sustain the referee's finding that plaintiffs have charged defendants more than 10 per cent above the cash price for fertilizer, and (2) that C. S., 2482, is unconstitutional.

Plaintiffs' first contention must be sustained. We find no evidence set out in the case on appeal as agreed upon by counsel for plaintiffs and defendants, which sustains the finding of the referee that plaintiffs have charged defendants for fertilizer advanced to them a price greater than 10 per cent above the cash price at which plaintiffs sold the same kind of fertilizer to cash customers at the same time this fertilizer was sold to defendants "on time." C. S., 2483. The only evidence offered at the trial before the referee was the testimony of Mr. Matthews, one of the plaintiffs. He testified that plaintiffs have not charged defendants for fertilizer advanced to them a price over 10 per cent above the cash price at which plaintiffs sold the same kind of fertilizer. There is no evidence that any sales of fertilizer were made by plaintiffs for cash at the same time and in the same quantity that the fertilizer was sold to defendants. Plaintiffs' exception to the referee's finding of fact No. 4 should have been sustained. There is error in the judgment in so far as it is ordered, adjudged and decreed therein that the liens executed by defendants are null and void.

If the referee's finding that plaintiffs have charged more than 10 per cent above the cash price for the same kind of fertilizer could be sustained, it would not follow that the liens are null and void. Advancements were made in money, merchandise and fertilizer. The statute provides that "if more than 10 per cent over the retail cash price is charged on any advances made under the lien or mortgage given on the crop, then the lien or mortgage shall be null and void *as to the article or articles upon which such overcharge is made.*" In the absence of a finding that the balance due is for fertilizer only, the lien would not be null and void, under the language of the statute. The referee finds that there is a balance due on the account for advancements made in money, merchandise and fertilizer. There is no finding that the balance due is for fertilizer only. It was error, therefore, to declare the liens null and void. In any event, the liens are valid with respect to advancements other than fertilizers.

It is not necessary for us to consider and pass upon plaintiffs' second contention, to wit, that C. S., 2482, is unconstitutional. No authorities are cited in appellant's brief in support of this contention; nor were we favored by oral argument upon the call of this case.

The action is remanded in order that the value of the crops seized by the sheriff and replevied by the defendants may be determined. No final judgment can be rendered until such value has been determined.

Error and remanded.

STATE v. JOHN WINSTON.

(Filed 21 September, 1927.)

Intoxicating Liquor—Spirituous Liquor—Dwelling—Purchase—Transportation—Statutes—Criminal Law.

While section 10 of the Turlington Act (ch. 1, Public Laws of 1923), does not make it a criminal offense for one to have intoxicating liquor in his own dwelling for his own personal use or that of his family and friends, it is a violation of the criminal law, by the express provisions of 3 C. S., 3411(b), for him to either purchase it elsewhere or carry it there.

APPEAL by the State from a judgment in favor of the defendant, rendered on a special verdict by *Parker, J.*, at August Term, 1927, of HALIFAX.

Criminal prosecution, tried upon an indictment charging the defendant, first, with purchasing, and, second, with transporting spirituous liquor, contrary to the statute in such cases made and provided, etc.

It was shown on the trial, and the special verdict establishes, among other things, that on 4 August, 1927, the defendant purchased, for his own personal use, between a pint and a quart of intoxicating liquor in Halifax County, and transported the same a distance of about three miles to his home, there to be used exclusively for his own personal consumption.

Upon the facts found and disclosed by the jury, a special verdict of not guilty was rendered under appropriate instructions from the court. The State appeals, assigning error. C. S., 4649.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

No counsel for defendant.

STACY, C. J. The special verdict seems to have been rendered on the theory that, as section 10 of the Turlington Act (ch. 1, Public Laws, 1923) sanctions or does not condemn the possession of liquor in one's private dwelling, occupied and used only as such, for the personal consumption of the owner, his family residing in such dwelling, and bona fide guests when entertained by him therein, the Legislature did not intend, in the same act, to make its purchase or transportation unlawful when such liquor is to be used solely for the purpose allowed by the statute.

Without debating the question at this late date, it is sufficient to say that the law is otherwise.

If it appear illogical to permit the use of spirituous liquor for a given purpose, and then prohibit the means by which it may be acquired for that purpose, it should be remembered that the life of the law has been experience, not logic.

The defendant, on the present record, is guilty of both purchasing and transporting spirituous liquor in violation of the terms of the statute. 3 C. S., 3411(b).

Let the cause be remanded with direction that a verdict of guilty be entered on the special findings of the jury. *S. v. Moore,* 29 N. C., 228.

Reversed.

FARMERS CO-OPERATIVE FERTILIZER COMPANY, INC., v. J. F. EASON, JR., MARY EASON AND B. C. EASON.

(Filed 21 September, 1927.)

1. **Bills and Notes—Indorser—Promise to Extend Time—Contracts—Consideration.**

   A promise of the payee of a note to an indorser after maturity of a promissory note to extend time for the payment of the note three or four years in consideration of the indorsement, is a sufficient consideration to enforce the promise between the parties to the agreement.

2. **Same—Parol Contracts—Written Contracts—Evidence.**

   Where one indorses a negotiable instrument after maturity upon a parol agreement with the payee that he will extend the time of payment of the note three or four years, the agreement is not required to be in writing, and being independent of the written note, does not fall within the rule that parol evidence will not be admitted to vary, alter or contradict the terms of a written contract.

3. **Same—Extension of Time—Definiteness.**

   An indorsement upon a promissory note made after maturity upon a parol agreement that the payee will extend the time of payment from that therein specified, for three or four years, is not so indefinite as to the time extended as to render the agreement unenforceable in that respect.

4. **Same—Limitation of Actions.**

   Where there is an extension of time given the maker of a note for three or four years in consideration of an indorsement made after the maturity of the instrument, the statute of limitations does not begin to run at least within the three years, and an action brought within a few months thereafter will not be barred.

APPEAL by defendant B. C. Eason from *Nunn, J.,* at June Term, 1927, of EDGECOMBE.

The plaintiff is a corporation organized under the laws of West Virginia, with its principal office in the city of Richmond, Virginia, and is engaged in selling fertilizer. The defendants, J. F. Eason, Jr. (referred to herein as J. F. Eason), and Mary Eason executed and delivered to the plaintiff the following promissory note:

"Richmond, Va. 5 May, 1921.

"On or before 1 January, 1922, after date, we promise to pay to Farmers Coöperative Company, Inc., or order, five thousand one hundred, thirty-three and 59/100 dollars ($5,133.59), with interest at 6 per cent from 1 July, 1920. Negotiable and payable at the Merchants National Bank, Richmond, Virginia.

"The makers and endorsers of this note hereby waive presentation, protest and notice of dishonor and the benefit of their homestead exemptions as to this obligation; and further agree to pay costs of collection, or an attorney's fee, in case payment shall not be made at maturity.

"J. F. EASON, JR.,
MARY E. EASON."

The note was secured by a deed of trust on property owned by J. F. Eason in Emporia, Virginia. This deed of trust was subject to one of prior date in favor of other parties to whom J. F. Eason was indebted. After maturity demand was made for payment of the amount secured by each deed. J. F. Eason was in financial straits, and the evidence tends to show that on 8 February, 1922, a parol agreement was made between the plaintiff (through its agent B. D. Linney), J. F. Eason and B. C. Eason, to the effect that if B. C. Eason would indorse the note above set out the plaintiff would give J. F. Eason (R. 12) and B. C. Eason (R. 15) three or four years before it would call on them for payment. Under these circumstances B. C. Eason wrote his name on the back of the note on 8 February, 1922. The terms were substantially repeated in a letter from the plaintiff to B. C. Eason, written 23 March, 1922, in which it was said, "As far as we are concerned, in view of your indorsement we are willing to give J. F. Eason, Jr., at least three or four years to pay his note." The agreement with B. F. Eason was made at his home in Edgecombe County, North Carolina. Two credits are entered on the note: $68.25 paid 23 February, 1924, and $1,164.14 credited on 18 July, 1925, as the proceeds of the sale of the property. There was evidence that the credit of $68.24 was a payment made by J. F. Eason. Two issues were submitted to the jury: 1. In what amount, if any, is the defendant, B. C. Eason, indebted to the plaintiff? 2. Is the plaintiff's cause of action against the defendant,

B. C. Eason, barred by the statute of limitations? The court instructed the jury if they believed the evidence to answer the first issue $5,133.59 with interest from 1 July, 1920, less a credit of $68.25 as of 23 February, 1924, and a credit of $1,164.14 as of 18 July, 1925, and if they believed the evidence to answer the second issue No. Judgment was rendered for the plaintiff and the defendant, B. C. Eason, appealed upon errors assigned.

J. F. Eason and Mary Eason filed no answer, and as to them no issues were submitted.

H. H. Phillips for appellant.
George M. Fountain for appellee.

ADAMS, J. The appellant takes the position that the contract purporting to extend the maturity of the note, even if sufficiently definite in point of time, was improperly admitted in evidence because it varied the terms of a written agreement. In this opinion we do not concur. If a contract is not within the statute of frauds the parties may elect to put their agreement in writing, or to contract orally, or to reduce some of the terms to writing and leave the others in parol. If a part be written and a part verbal, that which is written cannot ordinarily be aided or contradicted by parol evidence, but the oral terms, if not at variance with the writing, may be shown in evidence; and in such case they supplement the writing, the whole constituting one entire contract. *Cherokee County v. Meroney,* 173 N. C., 653.

The note sued on was executed by J. F. Eason and Mary E. Eason on 5 May, 1921, and was made payable on 1 January, 1922. It is admitted that B. C. Eason signed his name on the back of the note on 8 February, 1922, several months after it had been delivered to the payee and more than a month after its maturity. B. C. Eason had nothing to do with the original execution of the note; but at the time his name was written on it an agreement was made between himself, his brother, and the plaintiff, by the terms of which the date of maturity was extended in consideration of the indorsed signature, which was the only written part of the alleged agreement. Was the plaintiff precluded from showing that part of the contemporaneous agreement which was in parol? The answer to this question is given in a number of our decisions. In *Mendenhall v. Davis,* 72 N. C., 150, it is said that when the payee or a regular indorsee of a negotiable note writes his name on the back of it, as between him and a subsequent bona fide holder for value the law implies that he intended to assume the well known liabilities of an indorser, and he will not be permitted to contradict the implication; but that this rule does not apply between the original parties to a contract which is not in writing, although the indorsement of one or more parties may be evidence that some contract was made. It must always be a question of fact as to what the agreement was when the signature was written. The principle is approved and stressed in the very clear statement in *Hill v. Shields,* 81 N. C., 250: "It is settled in this State that parol testimony may be adduced under a blank indorsement to annex a qualification or special contract as between the immediate parties." These and other decisions which follow the earlier cases of *Love v. Wall,* 8 N. C., 313, and *Gomez v. Lazarus,* 16 N. C., 205, are reviewed in *Sykes v. Everett,* 167 N. C., 600, in which the doctrine is reaffirmed; and among later cases are *Lancaster v. Stanfield,* 191 N. C., 340, and *Trust Co. v. Boykin,* 192 N. C., 262.

The appellant cites *Smitherman v. Smith,* 20 N. C., 86, and *Terrell v. Walker,* 66 N. C., 244, in support of his contention. In the former the defendant indorsed the note as payee and offered to prove that at the time of the indorsement it was verbally agreed between him and the indorsee that if he would execute a deed to the indorsee for a certain tract of land the latter would strike out the indorsement, and that he had executed the deed in pursuance of this agreement. On appeal the Court held this evidence to be competent and said that it did not purport to set up by parol an executory contract variant from that which the law raised from the written indorsement; and in *Terrell's case* the proposed evidence was rejected on the ground that while the note purported on its face to be payable at once, the alleged contract made it payable at the option of the maker.

But in the case before us the signature on the back of the note is not that of the payee, but of a third party who at the time he wrote his name entered into a supplemental parol agreement with the payee and the maker, the signature constituting one of its material elements. The evidence was not objectionable as varying the terms of the original contract, for the rule that parol evidence will not be admitted to vary a written contract does not apply when the modification takes place after the contract has been executed. *McKinney v. Matthews,* 166 N. C., 576; *Adams v. Battle,* 125 N. C., 152; *Harris v. Murphy,* 119 N. C., 34; 10 R. C. L., 1034.

True, in several of the cited cases the indorser offered evidence in defense to prove the contemporaneous parol agreement; but if the principle upon which such evidence is admitted may be invoked in his defense, why should it not be admitted to establish his liability?

Other exceptions raise the question whether the contract based upon this evidence can be enforced. The appellant says that the time to which the maturity of the note was extended was not certain or definite, and that the contract was therefore void. It becomes necessary, then, to ascertain whether his premise is correct, for it is elementary that one of the essential characteristics of bills and notes is certainty as to the time of payment—the word "certainty" permitting the operation of the rule that a thing is certain which can be made certain. 1 Parsons on Bills and Notes, 38; 8 C. J., 134, sec. 234; 426, sec. 628; 427, sec. 629.

In determining whether the appellant's conclusion rests upon a sound basis, we must keep in mind the relation of the parties and the terms of their agreement. These are embraced in a narrow compass and we need not turn aside to consider collateral questions. For two reasons, at least, we are not concerned with the application of the general rule that a surety may be discharged by a contract to indulge the principal in a promissory note for a definite and limited period of time, founded on a sufficient consideration, reserving no right to proceed against the surety, and made without his assent: (1) the defendant had no connection with or relation to the original execution of the note and was not a surety; (2) he was one of the parties in the supplemental agreement to whom the plaintiff granted the alleged extension. *Forbes v. Sheppard,* 98 N. C., 111; *Bank v. Sumner,* 119 N. C., 591; *Hamilton v. Benton,* 180 N. C., 79; C. S., 3102. It is equally certain that the time of payment was not dependent upon any contingency or extraneous condition, such for example as a promise to pay at some indefinite time when the defendant might have available funds *(McNeill v. Man. Co.,* 184 N. C., 421); also that the rights of a bona fide purchaser without notice from the payee are not involved. *Mendenhall v. Davis, supra.* The parties who entered into the supplemental agreement are parties to this action.

With respect to the certainty of the time of payment, what is the meaning and scope of their agreement? We may first dismiss the contention that there was no consideration by recalling the principle that to make a consideration it is not necessary that the person making the promise should receive or expect to receive any benefit; it is sufficient if the other party be subjected to loss, detriment, or inconvenience. *Brown v. Ray,* 32 N. C., 73; *Kirkman v. Hodgin,* 151 N. C., 591; *Institute v. Mebane,* 165 N. C., 644; *Cherokee County v. Meroney, supra.* In effect the plaintiff agreed, in consideration of the defendant's indorsement of the note on 8 February, 1922, not to demand payment of the defendant or of J. F. Eason until the expiration of three or four years from that date; in effect the defendant agreed, in consideration of the plaintiff's promise not to sue for a period of three or four years, to become liable with J. F. Eason for the payment of the note at the time agreed on. As between them and the payee would they have been liable if they had executed a joint note payable three or four years after date? In *Robertson v. Spain,* 173 N. C., 23, it was held that a promise made by the plaintiff as indorsee of two notes "to take up and carry the notes till fall" was not a binding agreement not to bring suit for a definite period, so as to release one of the defendants who claimed to be surety, but that it was the mere expression of an intention not to force collection till the fall. The facts there are altogether at variance with those in the case before us. In *Shoe Store Co. v. Wiseman,* 174 N. C., 716, the defendant, indorser of a note for the maker who had become bankrupt, wrote to the plaintiff: "File your claim against the bankrupt court and get your share; what is left I will pay." The Court held that the letter contained an absolute promise to pay an ascertainable sum at an ascertainable date, and that the statute of limitations did not begin to run until the sum promised was definitely made known. It has been decided in other cases that where services are performed under a contract that compensation is to be provided for in the will of the party receiving the benefit and the latter dies intestate or fails to make such provision, the contract is then broken and, not only that suit may be brought after the breach, but that it cannot be maintained before. *Miller v. Lash,* 85 N. C., 51; *Freeman v. Brown,* 151 N. C., 111; *Helsabeck v. Doub,* 167 N. C., 205.

The turning point in these cases was certainty or uncertainty in the time of payment; and so it is in the decisions of other states. An agreement to extend the time until suit was necessary to prevent the bar of the statute of limitations was upheld in *Aiken v. Posey,* 35 S. W., 732; but a promise to make an extension of thirty or sixty days "if nothing transpires to change the status of the security" was held by the Supreme Judicial Court of Maine, not a contract to be bound by, but the language of caution and self-protection. *Bank v. Dow,* 9 Atl., 730. The case last cited may easily be distinguished from *Hamilton v. Prouty,* 50 Wis., 592, 36 A. R., 866, in which the appellate court held an extension of payment "for twenty or thirty days" to be sufficiently definite. There the defendant Crossman executed his note to Prouty and LeFevre, who indorsed and delivered it to the plaintiff. When suit was brought they alleged by way of defense that after the maturity of the note the plaintiff for a valuable consideration had twice extended the time of payment. In the opinion it was said: "The testimony shows that the first agreement for an extension made by Hamilton and Crossman was for twenty or thirty days, and it is urged that this was too indefinite to operate as a discharge of the indorsers. We are of the opinion, however, that the period must be regarded as definite for at least twenty days."

So in the present case an extension of time for three or four years was definite at least for three years. Conversely, the defendant's indorsement under the circumstances disclosed by the undisputed evidence was an agreement to be bound for the payment of the note at the end of the third year if payment were then demanded. After the expiration of the third year payment was demanded; meantime suit could not have been maintained. *Ferguson v. Hill,* 21 A. D., 641; *Bank v. Woodward,* 20 A. D., 566.

We need express no opinion as to whether the plaintiff could have elected to await the expiration of the fourth year to bring suit, or what effect, if any, such election would have had upon the statute of limitations. The defendant did not raise this point, but contended that the action was barred as to him because more than three years had intervened between the date of his indorsement and the institution of the action. In our opinion the cause of action arose at the expiration of three years from 8 February, 1922, and as the summons was issued a few months thereafter the action was not barred, whether the defendant's liability was that of joint maker, indorser, or guarantor. Presentation, protest, and notice of dishonor were waived, and the evidence indicates that the makers of the note are not financially responsible. C. S., 3044; *Sykes v. Everett, supra; S. v. Bank,* 193 N. C., 524; *Mudge v. Varner,* 146 N. C., 147; *Jenkins v. Wilkinson,* 107 N. C., 707; *Jones v. Ashford,* 79 N. C., 172. We find

No error.

J. F. LILLEY v. THE INTERSTATE COOPERAGE COMPANY.

(Filed 21 September, 1927.)

1. **Negligence—Master and Servant—Employer and Employee—Independent Contractor—Contracts—Burden of Proof.**

   In an action to recover damages for an injury alleged to have been negligently inflicted, the burden of proof is on the defendant to show that the act complained of was caused by the negligence, if any, of an independent contractor, when the defense is relied upon.

2. **Same—Railroads—Tramroads — Logs and Logging — Skidder — Evidence—Nonsuit—Questions for Jury—Statutes.**

   Where the defense of an independent contractor is relied upon in an action to recover damages for an alleged negligent injury inflicted on the plaintiff, evidence in plaintiff's behalf tending to show that the relationship of independent contractor had before the happening of the accident been severed and that the defendant's employees were in charge of and loading logs upon the defendant's tramroad when the plaintiff's injury occurred in the course of his employment, is sufficient to take the case to the jury, under the facts of this case, as to his employment by the defendant at the time, upon defendant's motion as of nonsuit. C. S., 567.

3. **Verdict—Issues—Appeal and Error—Harmless Error.**

Where the answer by the jury to an issue fully determining the action is given under proper instructions, an error in the instruction of the court on another issue will not be held for reversible error.

4. **Master and Servant—Employer and Employee—Negligence — Fellow-Servant—Statutes—Tramroads—Skidder—Logs and Logging.**

Where a tram railroad is engaged in loading logs by means of a skidder or loader operated by steam, and there is evidence tending to show that the fellow-servant of the plaintiff engaged in the scope of his employment in loading the logs, negligently caused one of the logs to drop upon the plaintiff and injure him: *Held,* under our statute, the common-law doctrine exempting the defendant tram does not apply, C. S., 3465, and the defendant is liable in damages for the negligent injury proximately caused.

5. **Same—Damages—Contributory Negligence—Diminution of Damages—Nonsuit—Questions for Jury.**

Contributory negligence of an employee of a tram railroad company injured while engaged in the course of his employment in loading logs upon the car by a steam-driven skidder, does not bar recovery, but is only to be considered by the jury in diminution of the plaintiff's damages when considering the issues. C. S., 3467.

6. **Instructions—Requests for Instruction—Appeal and Error—Objections and Exceptions—Master and Servant — Employer and Employee—Negligence.**

Where in the servant's action to recover damages for an alleged negligent injury inflicted upon him by the master, the judge properly charged upon the evidence the principles of law relating to the burden of proof and proximate cause, the defendant must aptly submit a proper request for more explicit instructions thereon in order to avail himself of this position on appeal.

APPEAL by defendant from *Daniels, J.,* and a jury, at April Term, 1927, of BEAUFORT. No error.

This was an action for actionable negligence brought by plaintiff against defendant. The defendant set up the defense that D. U. Martin or some of his subcontractors or employees were independent contractors, denied negligence and plead that plaintiff assumed the risk and was guilty of contributory negligence.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff in the employ of Louis Waters or D. U. Martin, as alleged in the answer? Answer: No.

"2. If so, was said D. U. Martin an independent contractor as alleged? Answer: No.

"3. Was plaintiff injured by the negligence of defendant as alleged in the complaint? Answer: Yes.

"4. Did plaintiff by his own negligence contribute to his injury? Answer: No.

"5. What damage, if any, is plaintiff entitled to recover of defendant? Answer: $2,000."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary facts and assignments of error will be considered in the opinion.

Ward & Grimes for plaintiff.
Small, MacLean & Rodman for defendant.

CLARKSON, J. The first question presented by defendant: Was the burden of proof upon defendant to satisfy the jury by the greater weight of the evidence that plaintiff was not employed by it, but by Louis Waters and D. U. Martin, and to satisfy the jury by the greater weight of the evidence that Martin was an independent contractor, as alleged in the answer?

In *Sutton v. Lyons,* 156 N. C., 5, it is held: "'Where the plaintiff has suffered an injury from the negligent management of a vehicle, such as a boat, car or carriage, it is sufficient prima facie evidence that the negligence was imputable to the defendant to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor or other person, for whose negligence the owner would not be answerable. 1 Sherm. and Redf. Neg., 71. Any other rule, especially where persons are dealing with corporations, which can act only through agents and servants, would render it almost impossible for a plaintiff to recover for injuries sustained by defective machinery or negligent use of machinery.' *Midgette v. Mfg. Co.,* 150 N. C., 341." *Embler v. Lumber Co.,* 167 N. C., 457.

The next question presented by defendant is the refusal of the court below to enter judgment as in case of nonsuit at the conclusion of all the evidence. C. S., 567. On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

As to the first issue: Was there sufficient evidence to be submitted to the jury that the plaintiff was not in the employ of Louis Waters or D. U. Martin? We so hold.

The defendant, Interstate Cooperage Company, was engaged in the lumber business. Certain timber was being cut on lands known as J. & W. Dismal tract, under contract between J. & W. Land Company and defendant. A certain logging railroad, about three or four miles, had been built into the woods from Pinetown. The railroad, engines, cars, railroad skidder or loading machines and logging equipment belonged to defendant. The logs were put on defendant's cars in the woods and the cars transported by defendant's engine, or tractor, to Pinetown, where they were transferred to the Norfolk Southern Railway Company.

The defendant contends that it had an independent contract with D. U. Martin, and that plaintiff was in the employ of Martin or Waters, subcontractor of Martin; that it had nothing to do with the operation of the logging road or getting the logs out of the woods or loading them; that it was Martin's duty to get the logs out of the woods, load them on the cars and have them hauled to Pinetown over the logging railroad and delivered to it f. o. b. cars.

On the other hand, plaintiff contended the hands were employed by Louis Waters, who had contracted this machine from Martin. Louis Waters sent for him to go to work there, but on Saturday, at 12 o'clock, Louis Waters gave up the contract he had with Martin, the defendant's alleged independent contractor. He, plaintiff, went to Pinetown the following Monday morning. "On Monday morning there was some talk about his (Louis Waters) giving up the contract with Martin and he was told to go ahead until Martin could get somebody else to take his place, and he went ahead. I went to work that day. He (Louis Waters) was foreman of the machine. Mr. Bell was there that morning and gave orders. He said here is a crew of men; pick them out and go into the woods." He, with Macon, Walter and Alvin Waters, Leman Modlin and Joe Hunter were picked out and went into the woods; "we got on the train and went into the woods to work." It was in evidence that J. W. (Walter) Bell, who gave the orders, had been working for defendant twenty-three years. He was at the time superintendent of defendant's mill at Belhaven, where the logs out of the woods were taken. "D. U. Martin didn't stay in the log woods at all. He stayed at the transfer at Pinetown. Mr. Bell was there some part of the time, and sometime the other boss. Mr. McDaniel was the head boss in the woods. He gave the orders and streaked out and located the timber.

. . . I saw Mr. Bell locating the railroad, streaking it out and taking the engine from one loading machine to another."

S. F. Wallace testified: That he worked for Mr. Bell about the time of plaintiff's injury. "I saw Mr. Bell around the woods right smart, straightening the lines and seeing that the timber was cut out, seeing that they stayed on certain sections of the land and didn't get off of it. . . . Louis Waters had contracted the machine, but told me on Saturday that he had given it up. The hands went to work on this machine Monday morning. I don't remember where I was working when Lilley was hurt. When I was there The Interstate Cooperage Company had the logs taken from the machine in the woods and loaded them on cars. Martin didn't have anything to do with that when I worked at the transfer loading logs. Mr. Walter (J. W.) Bell always paid me for it with a check. Mr. Martin didn't pay me."

Leman Modlin testified: "I was at Pinetown when all hands started to the woods with Louis Waters. I saw Mr. Bell there. I heard him say; he came to us and told us, and in consequence of what he said we went into the woods to work. I have seen Mr. Bell around Pinetown and Belhaven and have seen him in the log woods."

The logs were measured by Mr. McDaniel, an employee of defendant, after they were loaded on cars at Pinetown. McDaniels' work was scaling logs at Pinetown where they were transferred to the Norfolk Southern Railway, thence to Belhaven, where defendant's mill was located.

The evidence was sufficient to be submitted to the jury. Their answer to the issue was that plaintiff was not in the employ of Louis Waters or D. U. Martin, as alleged in the answer. In other words, from the evidence they found that plaintiff was in the employ of the defendant on the occasion of the injury. The answer to this issue, we think, makes the second issue immaterial, the good faith of the contract with D. U. Martin, the alleged independent contractor, or that the work was inherently or intrinsically dangerous. These matters are not necessary on the record to be determined or the charge of the court below in reference thereto. From the evidence the issues were separable—the seeming inadvertence in the charge was not prejudicial.

The principle laid down in *Ginsberg v. Leach,* 111 N. C., p. 15, is as follows: "The Supreme Court will not consider exceptions arising upon the trial of other issues, when one issue, decisive of the appellant's right to recover, had been found against him by the jury." *Hamilton v. Lumber Co.,* 160 N. C., 52; *Beck v. Wilkins-Ricks Co.,* 186 N. C., 215; *Sams v. Cochran,* 188 N. C., 734; *Michaux v. Rubber Co.,* 190 N. C., 617; *McNair v. Finance Co.,* 191 N. C., 710.

On the finding of the jury on the first issue and the facts being sufficient to sustain it, the plaintiff was employed by the defendant operating a logging road.

In *Stewart v. Lumber Co.*, 193 N. C., at p. 140, it is said: "The clear language of the Act of 1919, ch. 275, *supra,* says that the provisions of this article (Fellow-servant rule abrogated, C. S., 3465)—contributory negligence no bar, but mitigates damages. C. S., 3467, applies to *logging roads.* . . . (p. 141) In *Mott v. R. R.,* 131 N. C., at p. 237, it is said: 'The language of the statute is both comprehensive and explicit. It embraces injuries sustained (in the words of the statute) by "any servant or employee of the railroad company . . . *In the course of his service or employment with said company.*" The plaintiff was an employee and was injured in the course of his service or employment,' citing numerous authorities." The Fellow-servant doctrine has no application in this action.

The skidder, or loader, consisted of a stationary engine and boiler setting on a flat surface, the engine operated a drum around which a cable revolved and was attached to a swinging boom. In operating the grab, at the end of the cable it was fastened to the log and the log was pulled up by starting the engine and placed on the car. In the present case the plaintiff, in the course of his employment, fixed the grab as nearly as possible to the center of gravity of the log being lifted—a cypress log 16 feet long and 14 inches through.

Plaintiff testified: "Macon Waters was operating the engine on the loading machine. I was using the grabs, grabbing the logs. I carried the grab and put it on the log and told Waters to tighten it light. He brought the log up and never gave me any chance to get away. He pulled the log up and the log swung and it hit me on the shoulder and knocked me down. He dropped the log on me, on my leg. It came across me and threw me on my back and I under the log. It struck my shoulder first. He was where he could see me. The grabs did not turn loose. He dropped the log himself by turning the engine loose and the log came down. . . . The log was a cypress log about fourteen inches through. . . . I couldn't get out of the way. I started to run, but the log knocked me down before I could get out of the way, when I told him to tighten it light. If it had knocked me down, if it had not come down on me I would not have been hurt." Plaintiff further testified: "The falling log ruined me. I can't get about. I can't travel. I can't work. I can't plow. My leg hurts me so bad."

Dr. J. L. Nicholson, general surgeon at the Fowle Hospital, testified: "It is a permanent injury."

On the issue of negligence the court below clearly defined negligence and proximate cause and charged: "Under this issue the question for you to consider is whether or not under the circumstances surrounding him, Macon Waters exercised the care and prudence a man of ordinary care would use in operating the skidder at that time. If you are satisfied by the greater weight of the evidence that he failed to exercise such care—the burden being on the plaintiff—and that the failure was the proximate cause of the plaintiff's injury, you will answer the issue Yes; if not so satisfied, you will answer it No."

On the issue of contributory negligence the court below charged: "Upon this issue the burden is upon the defendant, who alleges contributory negligence of the plaintiff. Before you can answer the issue Yes, you must be satisfied by the greater weight of the evidence that the plaintiff was negligent and that his negligence was the proximate cause of the injury. . . . The plaintiff owed a duty similar to that which the defendant owed the plaintiff in operation of the skidder, to exercise the care that a man of ordinary prudence would exercise to protect himself from danger; if he failed to exercise such care and prudence, and such failure as a proximate result caused the injury, then he would be guilty of contributory negligence and your answer to the fourth issue would be, Yes."

If defendant had wanted a more explicit charge as to proximate cause on the contributory negligence issue, such instruction should have been requested. *Fleming v. Utilities Co.,* 193 N. C., p. 262. There was no exception or prayer for instructions on the issue as to damages.

On the whole record we can find no prejudicial or reversible error.

No error.

D. V. HOGGARD, ADMINISTRATOR OF GARLAND HOGGARD, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 21 September, 1927.)

1. **Negligence—Railroads—Bridges—Guard Rails—Evidence—Nonsuit—Questions for Jury.**

Evidence tending to show that a railroad company maintained a bridge generally used by the public on a street of a town twenty-three feet above its track, with a banister supported by posts eight feet apart with a ten-inch plank at the top and bottom running with the lengthway of the bridge, leaving an open space between the planks twenty-three inches wide, is sufficient to sustain a verdict against the railroad company, and to deny its motion as of nonsuit, for its negligence in providing a bridge with insufficient guards to protect those using it, with other evidence tending to show that the intestate, a lad of 9 years of age, was playing on the bridge with other children, stumped his toe on a nail on the bridge about two feet from the rail, and thus was precipitated through the opening between the planks upon the track below and received an injury which caused his death.

2. Same—Contributory Negligence—Children.

Held, under the evidence in this case it was a question for the jury to determine whether the plaintiff's intestate, a nine-year-old lad, was guilty of such contributory negligence as would bar his recovery, notwithstanding the negligence of the defendant railroad in not providing a bridge twenty-three feet above its track with sufficient banisters to prevent his falling through to the track below, thus sustaining injuries that caused his death.

APPEAL by plaintiff from *Grady, J.,* at April Term, 1927, of HERTFORD. Reversed.

This is an action for actionable negligence by D. V. Hoggard, administrator of Garland Hoggard, deceased, against the Atlantic Coast Line Railroad Company. The complaint alleged negligence in the construction of a bridge over defendant's roadbed, in the town of Tunis, N. C. The defendant denied any negligence and set up the plea of contributory negligence.

The bridge is described by R. W. Peele, a witness for plaintiff, as follows:

"I live at Tunis. I know the bridge on which Garland was hurt. The railing on this bridge has a four-foot banister, a ten-inch board at the bottom and a ten-inch board at the top, and nothing in between—about a twenty-three inch space in between the boards and the railing. The posts holding the railing are eight feet apart. The bridge is about twenty-three feet above the railroad.

"Q. Is the bridge used by the public? A. Absolutely, by anybody who wants to cross it—a good many people living either side of it use it.

"A street from Main Street leads to this bridge, crosses the railroad, and citizens on the west side of the railroad use this bridge to go to church, school, depot, postoffice, and stores down town. It is a public pass-way."

The plaintiff's intestate was nine years old.

As to the occurrence, E. H. Gardner testified, in part:

"I live at Tunis; knew Garland Hoggard. I saw him the day he was injured. I was about twenty-five or thirty yards away. There were several children running and playing, the Hoggard boy was in the lead. He stumped his toe and fell, pitching through the railing on the side of the bridge over the Atlantic Coast Line track. He was looking back when he stumped his toe. . . . Hoggard was running across the bridge; he stumped his toe and went between the boards forming the rail or guard on the bridge. I went to the bridge as soon as I could after he fell. . . . Garland's head and shoulders were on a cross-tie. . . . His shoulders had hit the railroad iron. He fell back with his neck kind of doubled back with one leg and one arm on the track. We picked him up and took him home. The accident happened about eight o'clock in the evening of 8 July, 1921. That was Friday. He died the following Sunday. He was healthy and bright as the average boy and about like them as to behavior. . . . Q. You say the boy stumped his toe? A. Yes, sir. I was sitting on my porch and was looking at the whole bunch of children. I don't know what he stumped his toe on—it might have been a nail. . . . I know he stumped his toe because it was torn to pieces when we got to him. The boy tried to catch with his hands to a post, but he was too far from it. When I found the little boy he was on the rail on the east side; this is the rail furthest from my house. The other boys were right behind him, and came up to the bridge, but turned back when they saw him fall. When he stumped his toe he was looking back, and as I said, fell and went through the rail. He was not more than two feet from the rail of the bridge when he stumped his toe." The boy's skull was fractured and shoulders broken.

At the close of plaintiff's evidence defendant moved for judgment as in case of nonsuit. C. S., 567. The court below sustained the motion. Plaintiff excepted, assigned error and appealed to the Supreme Court.

Roswell C. Bridger and Travis & Travis for plaintiff.
John E. Vann and Small, MacLean & Rodman for defendant.

CLARKSON, J. The only question presented on the record was whether the court below, under the facts, ought to have nonsuited the plaintiff. We think not.

In building the bridge the banisters were constructed with a plank 10 inches wide at the bottom on the floor of the bridge, then a space of 23 inches, and another 10-inch plank at the top, making a banister between 3½ and 4 feet high, with an open space between the top and bottom railings 23 inches wide. This open space extended from end to end of the bridge on both sides, being broken only by the posts, which were spaced 8 feet apart. The bridge was at the intersection of the street on which it was built, and Main Street, and was much traveled. Plaintiff's intestate was a boy 9 years old. On the day in question he was running, apparently in play with some other children who were following him. He started across the bridge, and when about the top, and about two feet from the railing, looked back toward his companions, stumped his toe and pitched headlong through the two feet space in the railings to the railroad track below. He attempted to catch one of the posts, but was too far away and missed it. The floor of the bridge is 23 feet above the track, and the boy's head and shoulders struck the rail of the track, breaking his shoulder and fracturing his skull. He died the next day.

In the present action it is conceded that it was the duty of the defendant to build the bridge over its railroad along the street.

The principle governing the necessity of guard rails and barriers is set forth in Vol. 9 C. J., p. 477, sec. 79, in part, as follows: "Where guard rails to a bridge or its approaches are clearly necessary for the safety of travelers, a failure to erect or properly to maintain them is negligence for which the municipality or the company charged with the duty to maintain the bridge is liable to a party who in the observance of due care is injured by reason of such neglect, and this it seems is so, though there is no statutory requirement that guard rails should be placed on the bridge."

It would be negligence *per se* for defendant to fail to provide railings or barriers on both sides of a bridge of the kind described in this action. *Stout v. Turnpike Co.,* 153 N. C., p. 513; 4 R. C. L., p. 217.

The guard rails were constructed with an open space of twenty-three inches. The principle applicable: did defendant use such care as a reasonably prudent man would exercise under the same or similar circumstances? Was the failure the proximate cause of the injury? *Morris v. Mills* (S. C.), 113 S. E., 632; *Tannian v. Amesbury,* 219 Mass., p. 310.

In *Campbell v. Laundry,* 190 N. C., at p. 654, it is said: "Negligence was defined according to Baron Alderson's formula: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Pollock on Torts, 442."

A highway or street is open for all—both adults and children. "The use thereof by children for purposes of play and sport is not as a matter of law an illegitimate use of a highway, 'Not to be anticipated by the authorities whose duty it is to keep highways in a reasonable safe condition.'" *Morris case, supra,* p. 634.

"Children, wherever they go, must be expected to act upon childish instincts and impulses, and others who are chargeable with a duty of care and caution toward them must calculate upon this, and take precautions accordingly." *Chief Justice Cooley* in *Power v. Harlaw,* 57 Mich., 107; *Loughlin v. Penn. R. R. Co.,* 240 Pa. St. Rep., at p. 179.

In the present case the boy was 9 years of age. The question of contributory negligence is one for the jury. While a child of tender years is not held to the same degree of care as one of mature years in avoiding an injury arising from the negligent act of another, it is ordinarily a question of fact for the jury to determine, in an action to recover damages therefor, whether under the circumstances, and considering his age and capacity, he should have avoided the injury complained of by the exercise of ordinary care. *Alexander v. Statesville,* 165 N. C., 527; *Fry v. Utilities Co.,* 183 N. C., 281.

In *Starling v. Cotton Mills,* 168 N. C., 229 and 171 N. C., 222, the child was 5 years old, and was held not to be guilty of contributory negligence. To the same effect in *Comer v. Winston-Salem,* 178 N. C., p. 383, the child was 28 months old. In *Campbell v. Laundry, supra,* the child was 4 years old, and the many cases cited therein were children under 7 years of age—it was held that contributory negligence could not be attributed to them.

In *Ellis v. Power Co.,* 193 N. C., p. 357, a young boy 9 years of age was held not guilty of contributory negligence in picking up an uninsulated electric wire near the pathway leading to and from his home. The Court, in that case, said: "It is a matter of common knowledge that this wonderful force is of untold benefit to our industrial life. Electric power is an industry-producing agency, and the hydro-electric development has been one of the greatest factors in the State's progress, and especially its industrial expansion. Every legitimate encouragement should be given to its manufacture and distribution for use by public utility corporations, manufacturing plants, homes and elsewhere. On the other hand, the *highest degree of care* should be required in the manufacture and distribution of this deadly energy and in the maintenance and inspection of the instrumentalities and appliances used in transmitting this invisible and subtle power." See cases cited in *Graham v. Power Co.,* 189 N. C., p. 381.

For the reasons given the judgment is
Reversed.

STATE v. ERNEST BOSWELL.

(Filed 21 September, 1927.)

1. **Criminal Law—Instructions—Presumption of Innocence—Special Requests for Instructions—Burden of Proof—Reasonable Doubt—Appeal and Error—Objections and Exceptions.**

Where upon the trial for a homicide the judge has fully and sufficiently charged the jury that the State must satisfy them of the guilt of the accused beyond a reasonable doubt, the mere failure of the trial judge to instruct them as to the legal presumption as to the defendant's innocence, will not be sufficient to grant a new trial on appeal in the absence of a special request to that effect, this presumption not being considered as evidence in the case, though the authorities in other jurisdictions are conflicting.

2. **Criminal Law—Conspiracy—Declarations—Evidence.**

The declarations of one conspirator in the furtherance of a common design of several to commit a homicide, while the design exists, is competent evidence against them all, though not made in their presence, and the fact of conspiracy may be proven by the acts of different persons when legally sufficient to establish it.

3. **Instructions—Contentions—Expression of Opinion—Statutes—Appeal and Error.**

An instruction will not be held for error as an expression of opinion by the trial judge forbidden by statute, because in stating the contention of the State in a criminal action he says that the defendant, a witness in his own behalf, should not be believed, as he had been proven a man of bad character, when the instructions upon the law arising from the evidence have been correct and free from error in this respect.

INDICTMENT for murder, before *Dunn, Emergency Judge,* at February Term, 1927, of WILSON. No error.

The defendant was indicted with Arthur Lamm and Tanner Poythress for the murder of one Clayton Beaman. The defendant was convicted, and from the sentence of imprisonment, appealed to this Court, and a new trial was awarded. The case is reported in 192 N. C., 150.

Upon the second trial the defendant was again convicted of murder in the second degree, and from the judgment of imprisonment pronounced appealed to this Court, assigning errors.

O. P. Dickinson and A. O. Dickens for defendant.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

BROGDEN, J. In a criminal action is it reversible error for the trial judge to omit to charge the jury that the defendant is presumed to be innocent in the absence of a request to so charge?

The defendant excepted to the charge of the court for the reason that the jury was not instructed by the trial judge that the defendant was presumed to be innocent and that the burden of proof was on the State. In the brief for the defendant it is stated: "We have looked in vain to find some North Carolina case that has been to the Supreme Court in which the trial judge failed to mention either the presumption of innocence or the burden of proof. This was evidently overlooked by the trial judge, but it makes it none the less damaging to the defendant's interests, and we believe that it constitutes reversible error. . . . Many courts, including this one, we think, hold that this legal presumption of innocence is a *piece of evidence* to be weighed in favor of the party for whom it operates and to be overcome, if it may be, by the State."

In support of the contention so made the defendant relies upon *Coffin v. U. S.,* 156 U. S., 432, 39 L. Ed., 481, in which the principle is thus stated by *Justice White:* "Concluding, then, that the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf, let us consider what is 'reasonable doubt.' It is of necessity the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof going to bring about the proof from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them; in other words, that the exclusion of an *important element of proof* can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence, and its resultant, the doctrine of reasonable doubt, makes more apparent the correctness of these views and indicates the necessity of enforcing the one in order that the other may continue to exist."

It is obvious that if the "presumption of innocence" is evidence in favor of a defendant, charged with crime, then it would be the imperative duty of the trial judge to instruct the jury as to such presumption.

The question as to whether the presumption of innocence is evidence or not has created a wide and divergent opinion among eminent writers and the courts of last resort. Dean Wigmore, in his Treatise on Evidence, 2 ed., Vol. 5, sec. 2511, writes: "No presumption can be evidence; it is a rule about the duty of producing evidence. . . . But when this erroneous theory is made the ground for ordering new trials because of the mere wording of a judge's instruction to a jury, the erroneous theory is capable of causing serious harm to the administration of justice. And, because of a temporary aberration of doctrine in the Federal Supreme Court, in *Coffin v. U. S., supra,* such harm was for a time impending. A notable academic deliverance, however, by a master in the law of Evidence, laid bare the fallacy with keen analysis; and it was soon afterwards discarded in the Court of its origin. In some State Courts the contagious influence of the original error was for a time noticeable; but sound views have gradually come to prevail in the greater number of jurisdictions."

The identical question was discussed in the case of *Commonwealth v. Holgate,* 63 Pa. Sup. Ct. (1916), p. 256. The opinion states the principle announced in the *Coffin case,* and then proceeds as follows: "The above statement has been severely criticised by both Wigmore and Chamberlayne, and what is claimed to be its fallacy exposed in detail in Thayer's Preliminary Treatise on Evidence, Appendix B, p. 551. The conclusion reached by the Supreme Court has not been followed in a number of states, and in *Agnew v. U. S.,* 165 U. S., 36, it is stated that the declaration in the *Coffin case* that legal presumptions are treated as evidence has a tendency to mislead. . . . We are convinced that the weight of authority is against the appellant's contention, and that the court did not err in not charging as to the presumption of innocence when he had already charged as to reasonable doubt, and that if defendant desired instructions on this particular phase of the subject, he should have requested the court so to do."

The Supreme Court of Pennsylvania, in the case of *Commonwealth v. Russogulo,* in an opinion by *Justice Moschzisker,* 106 Atl., 180, held: "The rule that a prisoner is always entitled to the benefit of any reasonable doubt results 'from the well-established principle that the presumption of innocence is to stand until it is overcome by proof' of a quality to carry that degree of conviction." In other words, the presumption of innocence is the reason which gives rise to, and forms the basis of, the rule as to reasonable doubt; or, as stated in 16 Corpus Juris, 535, par. 1007: "Its (the doctrine of the presumption of innocence) . . . function is to cast upon the State the burden of proving the guilt of the accused beyond all reasonable doubt."

The Supreme Court of Missouri, in *S. v. Kennedy,* 55 S. W., p. 293, examined the question with extensive citation of authorities, and came to the following conclusion: "In this State it has been ruled, in at least three cases, that it is not reversible error to refuse an instruction stating the presumption of innocence, when the court has fully instructed on the doctrine of reasonable doubt. . . . Yet when the court has, as in this case, fully instructed in his favor on the doctrine of reasonable doubt, and the evidence so abundantly sustains the verdict of the jury, we do not think the sentence should be reversed solely for the failure to state the presumption." In *Culpepper v. State,* 111 Pac., p. 679, the Supreme Court of Oklahoma, speaking through *Justice Richardson,* discusses the question at length, arraying the authorities and weighing with care the various reasons set forth on both sides of the question.

The principles of law announced in the foregoing authorities have been recognized and applied by the courts of Arkansas, South Dakota, Massachusetts, Kentucky, Ohio, Michigan, Florida, Kansas, and Connecticut: *Monk v. State* (Ark.), 197 S. W., 580; *S. v. Cline* (S. Dak.), 132 N. W., 160; *Commonwealth v. Sinclair* (Mass.), 80 N. E., 802; *Stevens v. Commonwealth* (Ky.), 45 S. W., 76; *Morehead v. State,* 34 Ohio St., 212; *People v. Ostrander* (Mich.), 67 N. W., 1079; *S. v. Ross* (Washington, 1915), 147 Pac., 1149; *McDuffie v. State* (Fla.), 46 Southern, 721; *S. v. Reilly* (Kan.), 116 Pac., 481; *S. v. Brauneis* (Conn.), 79 Atl., 70.

In this case the trial judge instructed the jury in substance to return a verdict of not guilty, unless the State had satisfied the jury beyond a reasonable doubt either that the defendant killed the deceased or that the deceased came to his death as the result of conspiracy between the defendant and another, and that defendant, pursuant to said purpose, was present, aiding and abetting in the crime. The trial judge further defined reasonable doubt, and the record discloses that the judge used the expression "beyond a reasonable doubt" perhaps a dozen times in his charge to the jury. It is undoubtedly true that, in this State, it has been the usual practice for trial judges to instruct the jury that the defendant is presumed to be innocent, and that the burden of proof is upon the State to satisfy the jury of the guilt of the accused beyond a reasonable doubt. It would have been proper and usual, under our practice, to have given such instruction, but the record discloses clearly and unmistakably that time after time in his charge the trial judge instructed the jury that they must be satisfied beyond a reasonable doubt of the guilt of the defendant before a verdict could be rendered against him. In view of what we deem the overwhelming weight of authority upon the question, we do not feel constrained to upset the verdict and grant a new trial upon the record before us in the absence of a request by the defendant for instruction upon the presumption.

The defendant also excepted to the admission in evidence of the declaration of one Lamm, who was jointly indicted with the defendant for the murder, such declaration not being made in the presence of defendant. The State contended that the defendant Lamm entered into a plot or conspiracy to kill deceased. It is thoroughly established law in this State that the declaration of one conspirator in furtherance of a common design is admissible, so long as the conspiracy continues, even though made in the absence of the other conspirator. Usually the conspiracy must first be established before such evidence is competent, "but this rule is often parted from, though it is an inversion of the order, for the sake of convenience, and the prosecution allowed either to prove the conspiracy, which makes the acts of the conspirators admissible in evidence against each other when done in furtherance of the common object, or he may prove the acts of different persons, and thus prove the conspiracy. *S. v. Anderson,* 92 N. C., 748. See, also, *S. v. Stancill,* 178 N. C., 683; *S. v. Brinkley,* 183 N. C., 720.

The defendant further excepts to the following statement of the trial judge: "And the State says that being interested in his testimony, being more vitally concerned in the outcome of the case, he has not told the truth, and a man of bad character, *as he has proven himself to be by various witnesses,* who have come upon the stand, would not have told the truth." The defendant earnestly insists that the expression "as he has proven himself to be by various witnesses," etc., is an expression of opinion upon the weight of evidence forbidden by law and constituting reversible error. The record discloses that the expression complained of occurred in the statement of the contentions of the State, and hence the trial judge was not endeavoring to instruct the jury as to the weight of the evidence, but was merely summarizing the contentions of the parties. We cannot hold the expression of sufficient moment to warrant a new trial.

The record, as a whole, leaves us with the impression that the defendant has had a fair trial. While the jury might well have brought in a verdict of acquittal from the evidence, yet, under our law, they were the sole finders of the facts and the sole weighers of the evidence, and we find no reason in law for disturbing the verdict.

No error.

JANIE O. HUNT v. J. W. COOPER, SHERIFF OF BERTIE COUNTY.

(Filed 28 September, 1927.)

1. **Taxation—Counties—Actions—Recovery of Illegal Taxes Paid—Pleadings—Allegations—Statutes.**

   In order to recover money paid under protest to the sheriff as taxes on land within the county, it is necessary to allege that the taxes sought to be recovered were illegally imposed or unlawfully collected, and in the absence of such allegation an injunction against the sale of the land for the payment of the taxes due will be denied. C. S., 7979.

2. **Same—Extension of Time to Collect Back Taxes.**

   The Legislature has the power to enact a law to extend the time to the sheriff for the collection of taxes due in the past, and to foreclose upon the land for that purpose, and where the owner has neglected to pay them such owner may not pay under protest and recover them, or successfully seek injunctive relief against the sheriff's sale, in the absence of allegation that the taxes collected by the sheriff were illegal or unlawfully collected. 3 C. S., 8005(a), (b), (c), (d); Laws of 1925, ch. 80; 1927, ch. 89.

3. Same—Injunction.

Where the owner has not paid the back taxes due within the county and their collection by the sheriff is authorized by statute, the mere fact that the sheriff knew the lessee had agreed with the owner to pay them and had given the former certain indulgence or extension of time for their payment, or that the sheriff had made settlement for the taxes, or that he had not given the owner notice of the lessee's delinquency, does not relieve the owner of liability for their payment or entitle him to injunctive relief against the sheriff's foreclosure upon the lands.

4. Same—Written Notice—County Treasurer—Parties.

In order to recover moneys illegally or unlawfully demanded of the sheriff from the owner on lands situated within the county, and paid by the owner under protest, and not returned to him, the statute does not authorize suit against the sheriff for its recovery, and the statutory method must be pursued by suit against the county, etc., by whose authority or for whose benefit the tax was levied, after thirty days written notice to the treasurer thereof.

APPEAL by plaintiff from a judgment of *Grady, J.*, dissolving a temporary order restraining the collection of taxes assessed against the plaintiff's property and dismissing the action. From BERTIE. Affirmed.

The plaintiff alleged in her first cause of action that she owned two farms in Bertie County which she had leased to J. T. Nicholls in 1923 and 1924 in consideration of an annual rent of $3,000, and the payment by Nichols of all taxes annually assessed against said property; that the taxes assessed against it for these two years were respectively $449.05 and $449.07; that for several preceding years the defendant had collected the taxes from Nicholls and had not at any time demanded payment of the plaintiff, although she had written him to inquire whether the taxes had been paid; that in 1925 and 1926 the defendant had settled with the county for the taxes due for 1923 and 1924 of his own volition; that from time to time he had granted indulgence to Nicholls, who died insolvent in December, 1926; that the defendant had levied upon and advertised the said lands for sale to pay delinquent taxes, and that the levy and advertisement were wrongful and unlawful.

For a second cause of action the plaintiff alleged that the taxes assessed for 1925 and 1926 amounted to $1,180.82, which Nicholls had agreed but failed to pay; that the defendant had continued his indulgence to Nicholls and had not called upon the plaintiff for payment, in consequence of which she had not attempted to assert her lien as landlord; and that she had paid the taxes for 1925 and 1926 under protest and had since demanded that the amount be returned.

The defendant demurred to each cause of action and his Honor being of opinion that the plaintiff could not recover on either, sustained the demurrer. The plaintiff excepted and appealed.

Craig & Pritchett for plaintiff.
Gillam & Spruill and Winston, Matthews & Kenney for defendant.

ADAMS, J. It is provided by statute that unless a tax or assessment, or some part thereof, be illegal or invalid or levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, and that if any person shall have a valid defense to the enforcement of a tax or assessment which is not illegal or unauthorized, he shall pay such tax or assessment to the sheriff and afterwards seek to recover it in accordance with the statutory method. C. S., 7979. The statute has been so frequently considered and explained as to call for the citation of no decisions pointing out the necessity of alleging, when an injunction is sought, that the tax or assessment is illegal or invalid or levied or assessed for an illegal or unauthorized purpose. As to this it is sufficient to say that there is no such allegation in either cause of action. Notwithstanding the want of such an allegation the plaintiff impeaches the authority of the defendant to make the sale. In 1923 the Legislature enacted a statute conferring upon sheriffs and tax collectors authority to collect arrears of taxes for the years 1917 to 1922; in 1925 the time was extended to 1923 and 1924; and in 1927 to 1925 and 1926, the authority thus conferred to cease and determine on the first day of January, 1929. 3 C. S., 8005(a), (b), (c), (d); Laws 1925, ch. 80; Laws 1927, ch. 89. The obvious purpose of the act of 1927 was to continue in effect until the first day of January, 1929, the power theretofore conferred upon sheriffs and tax collectors by the acts of 1923 and 1925. That the General Assembly has power to enact legislation of this character is not to be questioned. *R. R. v. Comrs.,* 82 N. C., 259; *Johnson v. Royster,* 88 N. C., 194; *Jones v. Arrington,* 91 N. C., 125; *ibid.,* 94 N. C., 541; *Wilmington v. Cronly,* 122 N. C., 383; *Lumber Co. v. Smith,* 146 N. C., 199.

The plaintiff bases her action chiefly upon the allegation that the defendant, knowing that Nicholls had agreed to pay the tax, indulged him from time to time, and finally settled with the county for all taxes due for 1923 and 1924, and thereby extinguished all liens upon her land for unpaid taxes, and that the defendant must seek his remedy in an action against the estate of Nicholls. We entertain a different opinion. The rental contract between the plaintiff and Nicholls did not relieve the plaintiff of the duty to see that her taxes were paid. She could not excuse her delay by pleading the sheriff's failure to notify her that her taxes were due. If the tax assessed against her land was not paid the lien continued in effect. From a legal viewpoint the tax debtor was the plaintiff, not Nicholls; and for this reason the principle upon which *Kerner v. Cottage Co.,* 123 N. C., 294, was decided is not applicable. The sheriff's settlement with the county did not extinguish the delinquent taxpayer's liability. *Jones v. Arrington, supra; Berry v. Davis,* 158 N. C., 170.

The only additional allegation in the second cause of action which may be regarded as material is this: some time in the year 1927 the plaintiff paid to the defendant "under protest" the taxes assessed against her property in 1925 and 1926, "and has since demanded a return of the same." This evidently is insufficient. There is no allegation, as the statute requires, that a written notice of the protest was given the defendant or that a written demand for repayment was made within thirty days after payment upon the treasurer of the State or county. The provision is that if a tax which is paid under protest in the method prescribed is not refunded upon legal demand, the taxpayer may sue the county, city, or town by whose authority or for whose benefit the tax was levied; but there is no authority for such a suit against the sheriff. *Ragan v. Doughton,* 192 N. C., 501; *R. R. v. Comrs.,* 188 N. C., 265; *Murdock v. Comrs.,* 138 N. C., 124; *Purnell v. Page,* 133 N. C., 125. Indeed, the plaintiff admits that she cannot maintain an action to recover the amount alleged to have been paid under protest. This judgment is

Affirmed.

LUCY R. OUTLAW v. J. W. COOPER, SHERIFF OF BERTIE COUNTY.

(Filed 28 September, 1927.)

See *Hunt v. Cooper, ante,* 265.

APPEAL by plaintiff from a judgment of *Grady, J.,* dissolving a restraining order and dismissing the action. Affirmed.

Craig & Pritchett for plaintiff.
Gillam & Spruill and Winston, Matthews & Kenney for defendant.

ADAMS, J. The controversy in this case is practically identical with that in *Hunt v. Cooper, ante,* 265, and the decision in the latter case is controlling in this.

Affirmed.

P. H. MITCHELL ET AL. v. W. T. HECKSTALL.

(Filed 28 September, 1927.)

1. **Deeds and Conveyances—Courts—Interpretation—Intent of Parties as Expressed by Themselves.**

Where the parties themselves have interpreted their deed to lands and expressed it in the written instrument, such interpretation will be given consideration by the court in its interpretation, and will be allowed to avail when substantially consistent with the other parts of the deed being construed and not declared inoperative for an apparent immaterial variation therewith.

2. **Same—Evidence—Boundaries—Location—Estoppel.**

Where in a deed to a mill site and certain lands included therein the parties have themselves expressed their true intent and meaning as to the quantity of lands conveyed, parol evidence consistent with the description in the deed, the admissions of the parties and the intent expressed by them in the instrument, are erroneously rejected upon the trial, and it is reversible error for the trial court to disregard them and to hold that the grantor in the deed and those claiming under him were estopped by the deed, when the evidence excluded would tend to establish the fact otherwise.

APPEAL by plaintiffs from *Grady, J.,* at February Term, 1927, of BERTIE. Error.

Craig & Pritchett for plaintiffs.
Winston, Matthews & Kenney for defendant.

ADAMS, J. The plaintiffs brought suit to recover damages of the defendant for wrongfully cutting and removing timber from land to which they claimed title and for an injunction perpetually to enjoin the trespass. The defendant denied the title of the plaintiffs and alleged that on 30 January, 1896, their ancestor, John Mitchell, had conveyed to him the property in controversy which was described in the deed as follows: "The Hoggard Mill, which embraces both the sawmill and grist mill, the acre of land on which is the mill site, the mill pond and all the privileges of ponding water and all lands and waters used and belonging to said mill, which was formerly the property of Josiah Mizell and W. J. Mitchell, and afterwards the property of Henry Mizell, John Mitchell and T. J. Heckstall. The true intent and meaning of this deed is to convey to W. T. Heckstall and his heirs, John Mitchell, one-third undivided interest in and to all of that certain mill, sawmill, grist mill, land covered by the waters of the pond and all other appurtenances and appliances appertaining to the Hoggard Mill."

The judgment contains these two recitals: "It was admitted in open court that the plaintiffs, as heirs at law of John Mitchell, deceased, are claiming under him a part of the lands covered by the waters of the Hoggard mill pond, as described in the pleadings, and that no other lands than those covered by the waters of said mill pond are in controversy in this action; it was also admitted that the defendant is the grantee in the deed executed by said John Mitchell and wife to the defendant, 30 January, 1896." (2) "The plaintiffs, heirs at law of John Mitchell, undertook to show during the hearing that the deed of conveyance from John Mitchell and wife to the defendant, as herein set out, only conveys the land to the run of the swamp as covered by the waters of the Hoggard mill pond, said run being located somewhere near the middle of the said mill pond."

It was adjudged that the plaintiffs were estopped by the deed of their ancestor, that the restraining order be dissolved, and that the defendant go without day.

There was evidence tending to show that John Mitchell, Henry Mizell and T. J. Heckstall had been tenants in common of a tract of land on the east or south side of the run of Hoggard mill swamp, including the mill site, that John Mitchell owned an adjoining but separate tract in which Mizell and Heckstall had no interest, and that the "run" is the dividing line between the two tracts. If it be granted that the general description of the land in John Mitchell's deed contains expressions which, standing alone, would include the whole pond, the deed nevertheless bears evidence of the interpretation the parties themselves gave it at the time of its execution—evidence of its true intent and meaning. This intent is abundantly supported by the language employed in the premises as well as the grantor's covenant of seizin and warranty as to his one-third undivided interest in the described property. In *S. v. Bank,* 193 N. C., 524, it is said that when the parties have interpreted their contract the courts will ordinarily follow such interpretation, for it is presumed that they knew what they meant and were least likely to mistake its purpose and intent. Indeed, the modern doctrine does not sanction the application of such technical rules as will defeat the intention of the grantor as expressed in the language he has used, for the obvious intention must prevail unless in conflict with some canon of construction or rule of property. Mistake or apparent inconsistency in the description shall not be permitted to disappoint the intent of the parties if the intent appear in the deed. This principle is established by an unbroken line of our decisions. *Ritter v. Barrett,* 20 N. C., 266; *Cooper v. White,* 46 N. C., 389; *Ipock v. Gaskins,* 161 N. C., 674;

Williams v. Williams, 175 N. C., 160; *Seawell v. Hall,* 185 N. C., 80. The admission entered of record does not preclude the application of this principle.

We are of opinion that there was error in adjudging that the plaintiffs are estopped by their ancestor's deed.

Error.

STATE v. JOHN GOODING.

(Filed 28 September, 1927.)

1. **Criminal Law—Judgments—Suspended Judgments—Good Behavior—Sentence.**

Where a defendant is tried for the violation of a criminal statute and taxed with the costs and required to give bond in a certain amount for his appearance in court for a certain period of time to show good behavior, the court after the full limit of time had expired is without warrant of law to adjudge that the defendant had violated the criminal law and impose a sentence of imprisonment upon him and assign him to work on the county roads.

2. **Same—Facts Found—Constitutional Law.**

Where a defendant convicted of a criminal offense has had sentence suspended upon condition that he appear at certain times in court and show good behavior, it is required that a judgment rendered at a later time find the facts upon which a sentence has been imposed and specify the findings of a certain criminal offense the defendant is found to have committed, in order to show that the defendant had been informed of the offense before sentence. Const., Art. I, sec. 11.

Appeal by defendant from *Cranmer, J.,* at March Term, 1927, of Jones.

The facts determinative of the question presented are as follows:

At the September Term, 1925, Jones Superior Court, in an action appearing on the minute docket as No. 53, *S. v. John Gooding,* the defendant waived the finding of a bill and entered a plea of "guilty possessing liquor"; whereupon Hon. W. M. Bond, judge presiding, as appears from the record, entered the following judgment: "Fine $150 and costs. Prayer for judgment continued for twelve months. Defendant required to give bond in the sum of $150 for his appearance here for two years to show good behavior."

The clerk of the Superior Court of Jones County, in response to request from the Attorney-General, certifies that the following entries appear upon the minutes of the court: "Fall Term, 1925. Defendant waives finding of bill and pleads guilty. Fine $150 and costs. Prayer for judgment continued for twelve months. Defendant required to give bond in the sum of $150 for his appearance at the next two terms of court and pay the costs. Spring Term, 1926, continued under former order. Fall Term, 1926, off. Bill of costs and fine of $150, paid at the Fall Term, 1925."

Thereafter, judgment was entered in the same cause by Hon. E. H. Cranmer, judge presiding, at the March Term, 1927, as follows:

"The court finds that the condition upon which the prayer was continued has been violated, therefore, it is ordered, adjudged and decreed that the defendant, John Gooding, be confined in the common jail of Jones County for a term of twelve months, and assigned to work the roads of Lenoir County."

From this latter judgment the defendant appeals, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Shaw & Jones for defendant.

STACY, C. J., after stating the case: There are several reasons why the judgment in this case, from which the defendant appeals, cannot be sustained.

In the first place, the only thing definite and certain about the judgment entered at the September Term, 1925, is the fine of $150 and costs. If the defendant were not entitled to be discharged upon the payment of this fine and costs, which he may have been, it is clear that under the next sentence, "prayer for judgment continued for twelve months," no judgment could be entered after the lapse of one year, or twelve months, which expired September, 1926. Therefore, the judgment rendered at the March Term, 1927, is without warrant of law and must be held for naught. *S. v. Hilton,* 151 N. C., 687.

In the next place, if the case were not off the docket at the March Term, 1927, it may be doubted as to whether the finding that "the condition upon which the prayer was continued has been violated," without more, is sufficient to warrant the imposition of a road sentence. In *S. v. Hardin,* 183 N. C., 815, it was said that where judgment in a criminal prosecution has been suspended on condition that the defendant pay costs and remain of good behavior, the term "good behavior," by correct interpretation, means such conduct as is authorized by the law of the State. In other words, the violation of some criminal law of the State must be made to appear before a defendant can be held to have violated the terms of such suspended judgment.

It is provided by Art. I, sec. 11, of the Constitution that in all criminal prosecutions "every man has the right to be informed of the accusation against him." And we apprehend a charge or finding that a defendant has not been of good behavior, or has violated the criminal law of the State, without specifying the nature or cause of the accusation against him, would not warrant the court in proceeding to sentence, even under a suspended judgment. *S. v. Everitt,* 164 N. C., 399. The record fails to disclose any evidence upon which the court acted.

Again, in *Yu Cong Eng v. Trinidad,* 271 U. S., 500, *Chief Justice Taft,* speaking to the constitutionality of an act of the Philippine Legislature, which undertook to prohibit any person, firm, or corporation, engaged in commerce or other activity for profit in the Philippine Islands, from keeping its account books in any language other than English, Spanish, or some local dialect, said "that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law." For like reason, and perhaps a stronger one, as it deals directly with the liberty of the citizen, we think it may be said that the enforcement in a criminal prosecution of the provisions of a suspended judgment, which are so indefinite and uncertain as to require the defendant to guess at their meaning, violates due process of law.

Upon the record as presented the defendant is entitled to be discharged.

Error.

JOHN EVANS AND WIFE, LAURA EVANS, v. W. S. COWAN.

(Filed 28 September, 1927.)

Evidence—Questions for Jury—Contradictory Testimony of One Witness—Deeds and Conveyances — Equity — Reformation of Instruments—Fraud or Mistake.

Where a timber deed is sought to be corrected for including erroneously other than cypress timber which alone was intended to have been conveyed, the testimony of one witness upon the question involved, though contradictory thereon, raises a question for the determination of the jury upon the issue of fraud or mistake.

CIVIL ACTION before *Moore, Special Judge,* at May Term, 1927, of BERTIE.

This was an action instituted by the plaintiffs against the defendant for the correction of a timber deed, executed by plaintiffs and delivered to the defendant.

It was alleged in the complaint that the contract between the parties was to the effect that the plaintiffs would sell to the defendant only the merchantable cypress timber growing and standing on or about four acres of land in the mill pond. Thereafter the defendant had a deed prepared, which included "all the timber of every kind and size in swamp at high water mark," upon a tract of land containing about 200 acres. John Evans died pending the suit, but he and his wife, Laura Evans, held title to the land upon which the timber stands by entireties.

The plaintiffs further alleged "that said deed and contract had not been drawn in accordance with the bargain had with W. S. Cowan (the defendant), and that they had been tricked and deceived into signing said paper-writing, and that it did not contain their contract."

The evidence tended to show that the bargain was made by the plaintiffs with one Winbrow, agent of defendant.

Plaintiff testified: "*After we had our bargain with Winbrow,* he came back there and read the contract. Mr. Taylor, Mr. Winbrow and Mr. Cowan came. I don't know who wrote the paper. I don't know what Winbrow said the first time about having the timber paper written. When they came back they had a paper and Mr. Taylor read it. There was nothing in the paper but cypress—that is all they read to me. . . . Taylor read the contract. Winbrow was there. He was the one that came and made the bargain. . . . I can't read and write. I signed the deed. I can write my name. I signed the name to the complaint. . . . Mr. Taylor told me that the deed only contained cypress. Yes, Cowan and Winbrow were there. He told me it contained nothing but cypress and I signed it. . . . Cowan was at my house at the time the deed was signed. I tell the jury that he was there when it was read." Taylor was the justice of the peace who took the acknowledgment of plaintiffs.

Plaintiff further testified: "I didn't say that Winbrow came to me and talked to me about buying the timber. I had no conversation with him. My husband did. I didn't hear it. Winbrow said nothing to me. He came to see my husband. My husband told me he was going to sell."

From judgment for plaintiff, assessing damages at $50, the defendant appealed.

Bridger & Ely and Winston, Matthews & Kenney for plaintiffs.
Craig & Pritchett for defendant.

BROGDEN, J. The merit of this appeal involves the sole question as to whether or not there was sufficient evidence of mistake or fraud to be submitted to the jury. The only evidence bearing upon the question is the testimony of plaintiff, Laura Evans. She testified both ways upon the subject. In one portion of her testimony she said: "After we had our bargain with Winbrow he came back there and read the contract." At another time she testified that she had no conversation with Winbrow, the agent of defendant. However, it appears that she further testified that there was a misreading of the deed to her at the time of her signature, and that the defendant and his agent were present. The defendant Cowan denied that he was present, and Mr. Taylor, the justice of the peace, denied that there was any false reading of the deed.

Conflicting statements of a witness in regard to a material or vital fact do not warrant a withdrawal of the case from the jury. Such inconsistencies only affect the credibility of the witness, and it is the function of the jury to determine whether any weight or what weight shall be given to the testimony. *Shell v. Roseman,* 155 N. C., 90; *Christman v. Hilliard,* 167 N. C., 5; *Smith v. Coach Line,* 191 N. C., 589.

We hold, upon the record, that there was sufficient evidence to be submitted to the jury, and the judgment is

Affirmed.

E. V. GASKINS v. EVELYN D. MITCHELL, ADMINISTRATRIX OF W. G. MITCHELL ET AL.

(Filed 28 September, 1927.)

Trials—Issues—Contracts—Pleadings—Counterclaim—Appeal and Error —New Trials.

Where in an action to recover for goods sold and delivered a complete defense is set up in the answer upon a warranty, it is reversible error for the trial court to submit, over the defendant's exception, but one issue as to plaintiff's damages, and refuse to submit an issue tendered by the defendants upon the defense it had set up.

APPEAL by defendants from *Moore, Special Judge,* at May Term, 1927, of BERTIE. New trial.

The issues submitted to the jury were answered as follows:

1. Are the defendants indebted to the plaintiff, and if so, in what sum? Answer: $228.50, with interest.

2. Is the plaintiff indebted to the defendants upon the counterclaim set up in the answer, and if so, in what sum? Answer: Nothing.

From judgment upon the verdict, defendants appealed to the Supreme Court.

Gillam & Spruill for plaintiff.
A. T. Castelloe and Craig & Pritchett for defendants.

CONNOR, J. This is an action to recover of defendant, administratrix of W. G. Mitchell, the balance due on the purchase price of one Leader Water System, sold by plaintiff to W. G. Mitchell, and installed in his store-building at Aulander, N. C. Defendants deny that the said W. G. Mitchell purchased the said water system, as alleged in the complaint. In their answer they allege that "the said water system was installed by plaintiff in the store of the said W. G. Mitchell, deceased, with the express warranty on the part of the plaintiff to the said deceased, that the same would furnish an ample supply of water to keep water running in the soda fountain in said store at all times and would give complete satisfaction in every respect, and with the said warranty and understanding the deceased agreed to purchase same and did so purchase same; that soon after the said water system was installed as aforesaid, the said W. G. Mitchell notified plaintiff that the water system was not giving satisfaction or performing the work as he had warranted the same to do, and the plaintiff was asked to remove the same from the building; that defendants are willing to return said system to the plaintiff at any time, and have asked plaintiff several times to remove the same; that the aforesaid warranty is specifically set up and pleaded as a defense to plaintiff's cause of action."

In reply to this allegation, plaintiff alleges that "he has performed each and every condition of said contract of sale with the said W. G. Mitchell, deceased, and that there has been no breach of warranty in the sale of said property on the part of the plaintiff."

Defendants excepted to the issues submitted to the jury and tendered other issues which arise upon the pleadings with respect to the terms upon which the water system was installed, and as to whether plaintiff had complied with said terms. To the refusal of the court to submit these issues defendants excepted. Assignments of error based upon these exceptions are sustained. There was evidence tending to support the allegations in the answer. Defendants' contentions upon this evidence were not presented to the jury in the charge of the court upon the issues submitted. The facts in controversy upon which defendants rely as a defense to plaintiff's recovery have not been determined by the jury.

In *Carter v. McGill,* 168 N. C., 507, it is said: "A cause of action or defense should not be tried upon the issue as to damages, merely, where objection is made, but a separate issue should be submitted, and the issue as to damages left to embrace that subject alone." See, also, *Brown v. Ruffin,* 189 N. C., 262, where it is said that when a material defense is pleaded, it is proper for the court to submit an issue on it. *Owens v. Phelps,* 95 N. C., 286.

Where liability either upon contract or in tort involves material facts, alleged by one party and denied by the other, in the pleadings, an issue should be submitted to the jury, clearly presenting the controversy for their determination, from the evidence, and under the instructions of the court. It is not, ordinarily, sufficient to submit an issue as to indebtedness or damages, merely.

For the error with respect to the issues, defendants are entitled to a

New trial.

STATE v. A. B. SCHLICHTER AND O. M. SCHLICHTER.

(Filed 28 September, 1927.)

1. **Constitutional Law—Criminal Law—Certiorari—Review.**

Where the Superior Court judge has declared a sentence by a preceding judge void as an alternative judgment in a criminal prosecution, and has therefore disregarded it, the Supreme Court is authorized under our Constitution empowering it among other things "to issue any remedial writs necessary to give it general supervision and control over the proceedings of the inferior courts" to issue a writ of *certiorari* to bring the question before it upon the State's application therefor.

2. **Judgments—Alternative Judgments — Suspended Judgments — Execution—Appeal and Error—Matters of Law—Reversal.**

Where the officials of a bank have knowingly permitted deposits to be made in the bank while insolvent, a judgment that they be confined in the State's prison for a certain time, capias to issue at a stated term if the judge holding the term should find as a fact that restitution to the receiver in a certain amount of money had not been made by the defendants, is neither an alternate nor a suspended judgment, but is suspended execution and is valid; and the action of the trial judge at the ensuing term in holding it invalid as a matter of law, is reversible error.

PETITION for *certiorari* to review judgment of *Midyette, J.,* rendered at January Term, 1927, of HALIFAX.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Pippen & Picot and Geo. C. Green for defendants.

STACY, C. J. The State's application for writ of *certiorari* to bring up the record in this case for review was made and allowed under Article IV, sec. 8, of the Constitution which empowers this Court, among other things, "to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." The remedial appropriateness of the writ is established by the authorities on the subject. *S. v. Swepson,* 83 N. C., 585, and cases there cited.

The question of law presented by the record arises out of the following fact situation:

1. At the August Term, 1925, Halifax Superior Court, the defendants, A. B. Schilchter and O. M. Schlichter, president and cashier, respectively, of the Bank of Hollister, were convicted of violations of the banking act, in that as officers of said bank, they received or permitted an employee to receive deposits therein with knowledge of the fact that, by reason of the bank's insolvency, such deposits then being received were taken at the expense or certain peril of the depositors presently making them. *S. v. Hightower,* 187 N. C., 300.

2. Judge Albion Dunn, who presided, after finding that the defendants had paid $12,000 to the receivers of the defunct bank, upon recommendation of the solicitor, adjudged "that the defendant, A. B. Schlichter, be confined in the State's prison for a term of not less than three years and not more than five years, and that the defendant, O. M. Schlichter, be confined in the State's prison for a term of not less than two years and not more than three years. Capias to issue at the January Term, 1927, of Halifax Superior Court, if the judge holding the said court shall find as a fact that the said A. B. Schlichter and O. M. Schlichter have failed to pay to the receivers of the said bank the sum of eight thousand eight hundred and thirty dollars, with interest from the 25th day of August, 1925."

3. At the January Term, 1927, Halifax Superior Court, Judge Garland E. Midyette, who presided, found as a fact that the defendants had failed to pay to the receivers of the Bank of Hollister the sum of $8,830, with interest from 25 August, 1925, whereupon the solicitor for the State moved that capias issue in accordance with the judgment previously entered. The court continued this motion for capias until the January Term, 1928, being of opinion that the judgment entered at the August Term, 1925, was void, because alternative, and that the case was then before the court for disposition as if no previous judgment had been rendered.

It is manifest, we think, that Judge Midyette declined the solicitor's motion for capias because of his opinion that no valid judgment had been entered in the case, and not as a matter of discretion under the judgment previously rendered, if indeed he had such discretion, which it is unnecessary to decide, as the question is not before us.

But it was error to hold the judgment of Judge Dunn, entered at the August Term, 1925, void as a matter of law. It is not an alternative judgment within the principle announced in *S. v. Perkins,* 82 N. C., 682, nor a suspended judgment as was the case in *S. v. Hardin,* 183 N. C., 815, but rather a suspended execution as discussed in *S. v. McAfee,* 189 N. C., 320, and *S. v. Vickers,* 184 N. C., 676, which, strictly speaking, is no part of the judgment at all. *S. v. Yates,* 183 N. C., 753.

These questions have been so thoroughly discussed in the recent cases of *S. v. Edwards,* 192 N. C., 321, *S. v. Tripp,* 168 N. C., 150, and *S. v. Everitt,* 164 N. C., 399, that we are content simply to refer to what was said in these late cases as authority for our present position. See, also, *S. v. Shepherd,* 187 N. C., 609; *S. v. Phillips,* 185 N. C., 620; *S. v. Strange,* 183 N. C., 775; *S. v. Burnette,* 173 N. C., 734; *In re Hinson,* 156 N. C., 250; *S. v. Hilton,* 151 N. C., 687; *S. v. Whitt,* 117 N. C., 804; *S. v. Crook,* 115 N. C., 763; *S. v. Overton,* 77 N. C., 485; *Ex parte United States,* 242 U. S., 27; *Bernstein v. U. S.,* 254 Fed., 967; Notes, 39 L. R. A. (N. S.), 242, and 33 L. R. A. (N. S.), 112.

Error.

A. B. MORRIS v. BOGUE DEVELOPMENT CORPORATION AND L. B. WEST.

(Filed 28 September, 1927.)

1. Evidence—Pleadings—Amendments—Admissions.

In a civil action to recover for services rendered where an amendment to the complaint has been allowed and filed by the plaintiff, the allegations of the original complaint when contradictory to the plaintiff's position upon the trial are competent evidence of admissions when relevant and having that effect.

2. Same—Attorney and Client—Principal and Agent.

Where the original complaint has been amended its allegations are competent as admissions of plaintiff, when falling within the rule, though the pleading has been signed only by the plaintiff's attorney and not signed or verified by him, it being within the scope of the authorized acts of the attorneys and a part of the court records in the case.

APPEAL by Bogue Development Corporation from *Cranmer, J.*, and a jury, at June Term, 1927, of CARTERET. New trial.

C. R. Wheatley and J. F. Duncan for plaintiff.
E. H. Gorham and Cowper, Whitaker & Allen for defendant.

CLARKSON, J. This is a civil action brought by plaintiff against defendant to recover $1,000. The amended complaint alleges "being the brokerage due the plaintiff for his services, time and skill."

For the purpose of impeachment, the defendant offered in evidence the original, or first, complaint filed in the action. This was objected to by plaintiff, and sustained by the court below. In this we think there was error.

In *Norcum v. Savage,* 140 N. C., 472, it was decided: Where defendant had been permitted to file an amended answer, the original answer containing admissions was admissible. *Adams v. Utley,* 87 N. C., 356; *Guy v. Manuel,* 89 N. C., 83; *Cummings v. Hoffman,* 113 N. C., 267; *Gossler v. Wood,* 120 N. C., 69; *Willis v. Tel. Co.,* 150 N. C., 318; *White v. Hines,* 182 N. C., 275; *Weston v. Typewriter Co.,* 183 N. C., p. 1.

In *Guy v. Manuel,* 89 N. C., at p. 84, quoting from *Adams v. Utley, supra,* it is said: "It was held that the evidence was competent, and that 'the admissions of a party are always evidence against him, and the fact that they are contained in the pleadings filed in the cause does not affect its competency." But the defendant's counsel insist that that case is distinguishable from this, because there the answers were verified by the defendant, and in this, they are simply signed by counsel without verification. It is a distinction without a practical difference. For the admissions of attorneys in the conduct of an action are always admissible in evidence against their clients, especially when the admissions are of record."

In *Ledford v. Power Co., ante,* at p. 102, it is said: "The pleading was competent, although in another case—a declaration of the party. 22 C. J., sec. 374(3); *Bloxham v. Timber Corp.,* 172 N. C., 37; *Alsworth v. Richmond Cedar Works,* 172 N. C., p. 17; *Pope v. Allis,* 115 U. S., p. 353."

For the reasons given, there must be a
New trial.

J. S. WHITEHEAD v. WILSON KNITTING MILLS.

(Filed 28 September, 1927.)

Insurance, Fire—Mortgages—Trusts—Premiums—Loss Payable Clause—Conditions—Covenants—Contracts—Cancellation—Notice—Statutes.

The provision in the loss payable clause of a fire insurance policy taken out by the mortgagor that the mortgagee (or trustee) will pay the premiums on demand should the mortgagor not do so, is *held* to be a condition upon which the mortgagee may receive the benefit of the protection afforded by the policy as a special contract made in his favor, and not as a covenant that he will pay the premiums on demand of the insurer, upon the mortgagor's default: and upon the mortgagee's refusal or neglect to pay the premiums in default upon the insurer's demand, the latter may, after ten days written notice, cancel the policy contract under the provisions of our statute. C S., 6437.

CONNOR, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Nunn, J.,* at June Term, 1927, of WILSON.

Civil action to recover of defendant premiums paid by plaintiff on fire insurance policies, tried originally in the Wilson General County Court, where there was a partial recovery for the plaintiff. On appeal to the Superior Court the cause was remanded with direction that a judgment of nonsuit be entered in the case.

The fact situation is as follows:

1. In March, 1920, J. T. O'Briant executed to the defendant a purchase-money deed of trust on land situate in Wilson County, to secure an indebtedness of $30,000, in which, among other things, "The said O'Briant agrees to and with the said Knitting Mills Company, that he will cause the buildings located upon said premises to be insured against loss or damage by fire in at least the sum of $25,000, and that he will pay all premiums thereon, and that the said policy or policies shall be made payable to the said trustee for the benefit of the said Knitting Mills, and that if the said O'Briant shall fail, neglect or refuse to effect such insurance and to pay the premiums thereon, then the said Knitting Mills may effect such insurance and pay all premiums thereon, and all premiums paid by it shall be due and payable within 30 days from date of payment, and shall be secured in same manner as the notes or bonds herein recited are secured."

2. Pursuant to this stipulation the said O'Briant, on 25 March, 1920, procured and had the plaintiff, as agent, to issue to him three fire insurance policies of $10,000 each on the buildings located on the premises above mentioned. Each of said policies was issued for one year and contained, or had attached thereto, a "New York standard mortgage clause" in which, among other things, it was provided that any loss or

damage arising under said policy, should be payable to the trustee, as his interest might appear, etc.

3. Upon the execution of the policies, they were delivered to the trustee, named in the deed of trust, who immediately forwarded them to the defendant at its main office in Tarboro, where they were received and accepted by the defendant, and have been in its possession ever since.

4. One of the provisions appearing in the standard mortgage clause attached to each of the policies is as follows: "*Provided,* that in case the mortgagor or owner shall neglect to pay any premium, due under this policy, the mortgagee (or trustee) shall, on demand, pay the same."

5. Though repeated demands were made upon J. T. O'Briant to pay the premiums on these policies, he neglected to do so for more than sixty days; whereupon the plaintiff notified the trustee of the nonpayment of said premiums, and was advised that, in the opinion of the trustee, "both the mortgagor and the mortgagee are liable for the premiums."

6. Acting upon the assumption of liability on the part of both O'Briant and the defendant for the payment of said premiums, the plaintiff, in accordance with local custom, paid, out of his own personal funds, the premiums, amounting in the aggregate to $495, to the companies issuing the policies.

7. Thereafter, on 5 September, 1920, the plaintiff, for the first time, notified the defendant of the nonpayment of said premiums and demanded payment thereof. The defendant declined and refused to pay the same. The policies were not surrendered by the defendant, nor were they canceled by the plaintiff. They remained in full force and effect until 25 March, 1921, the date of their expiration.

8. The plaintiff had the right at any time to cancel said policies, or to have them canceled, for nonpayment of premiums, also the right to cancel them, as to the interest of the mortgagee, by giving the mortgagee ten days written notice of cancellation. C. S., 6437. Had this course been pursued, the defendant would have taken out other insurance and added the amount of premiums, required to be paid therefor, to O'Briant's indebtedness under the terms of the deed of trust.

9. Plaintiff has been unable to collect for the premiums in question, and O'Briant is now financially unable to pay them. The plaintiff is seeking in this action to hold the Wilson Knitting Mills liable for the payment of said premiums under the terms of the policies and the deed of trust.

From the order and judgment of the Superior Court, remanding the cause with direction that it be nonsuited, the plaintiff appeals, assigning error.

John H. Jennings for plaintiff.
John L. Bridgers for defendant.

STACY, C. J., after stating the case: The appeal presents, for the first time in this jurisdiction, the question as to whether the clause, "*Provided,* that in case the mortgagor or owner shall neglect to pay any premium, due under this policy, the mortgagee (or trustee) shall, on demand, pay the same," incorporated in the New York standard mortgage clause, attached to each of the policies, for the unpaid premium on which it is sought to hold the defendant liable, is to be construed as a *covenant* on the part of the mortgagee to pay any premium, neglected or omitted to be paid by the owner or mortgagor, or merely as a *condition,* which, if not fulfilled, will bar the mortgagee from any right of recovery for loss or damage under the policy of insurance. The plaintiff contends that the words in this clause import a contract on the part of the mortgagee to pay the premium if the mortgagor fail or neglect to pay it, while the defendant says that the clause in question should be construed as a condition, and not as an agreement.

According to the clear weight of authority in other jurisdictions, where the clause in question has been construed, it is held to be a condition, and not a covenant. In fact, in but two cases has a contrary conclusion been reached, and they have not been followed in the more recent decisions.

Apparently, the earliest reported case dealing with the matter is *St. Paul F. & M. Ins. Co. v. Upton* (1891), 2 N. D., 299, 50 N. W., 702. There it was said that the mortgage clause, like the ones now before us, amounted to a promise on the part of the mortgagee to pay the premium, due on the insurance policy, in case the mortgagor failed to pay it.

This case was followed, with like result, in *Boston Safe D. & T. Co. v. Thomas* (1898), 59 Kan., 470, 53 Pac., 472.

But as opposed to these North Dakota and Kansas cases, in which the clause in question was held to be a covenant and not a condition, the following South Dakota, New York, Rhode Island, Texas, California and Wyoming cases, supported by two from Missouri, hold it to be a condition and not a contract or covenant: *Ormsby v. Phœnix Ins. Co.* (1894), 5 S. D., 72; *Coykendall v. Blackmer* (1914), 161 App. Div., 11, 146 N. Y. S., 631; *Home Ins. Co. v. Union Trust Co.* (1917), 40 R. I., 367, L. R. A., 1917 F, 375; *Johnson, Sansom & Co. v. Fort Worth State Bank* (1922), 244 S. W. (Tex.), 657; *Schmitt v. Gripton* (1926), 247 Pac. (Cal.), 505; *Farnsworth v. Riverton Wyoming Refining Co.* (1926), 249 Pac. (Wyoming), 555. And in support of the same conclusion are the cases of *Trust Co. v. Phœnix Ins. Co.; Same v. German-American Ins. Co.* (1919), 201 Mo. App., 223, 210 S. W., 98, both being disposed of in a single opinion.

The position of the majority of the courts is perhaps as well stated in *Coykendall v. Blackmer,* 161 App. Div., 11, 146 N. Y. S., 631, as in any other case. The facts were that George Blackmer, as mortgagee of certain real property, became beneficiary under the standard mortgage clauses attached to a number of fire insurance policies, which, at the request of the owner and mortgagor, had been issued and delivered to the mortgagee by the insurance agent, the plaintiff in the case. Nine of the policies had been issued in 1907 for the term of three years, and renewed for a like term in 1910; and two were for one year each. The action was brought against the executrix of the estate of the mortgagee. The mortgagee procured none of the policies, nor were they issued at his request, but all were mailed to and received and retained by him, whether with the knowledge of the contents of the policies and the attached riders did not appear, and was said to be perhaps not material. No part of the premium was ever paid by the owner, and no demand for payment of any portion of the premium was made by the plaintiff upon the mortgagee until some time in January, 1911. The plaintiff obtained from the insurance companies assignments of all causes of action against the defendant and brought suit thereon.

Speaking to the question presented in that case, which is similar to the one raised in the case at bar, the court said:

"The only question, therefore, before us is whether the plaintiff as matter of law is entitled to a recovery; that is, whether the clause, '*provided,* that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same,' should be construed as a covenant upon the part of the mortgagee to pay the premium in the event of the neglect of the mortgagor to pay the same, or should be construed merely as a condition which, if not complied with by the mortgagee, would foreclose him of the right to a recovery given him in the preceding portion of the mortgagee clause, notwithstanding the happening of any of the prohibited matters specified therein, which under the conditions of the policy itself would render the policy void. It must be conceded that unless the clause in question constituted a covenant, no recovery can be had in this action.

"We are of the opinion that the word 'provided' was used in the sense of 'if' or 'on condition,' and hence that the clause referred to should be construed as a condition and not as a covenant. The word 'provided' is defined by several authorities as follows: By Webster, 'on condition; by stipulation; with the understanding; if'; by Cyclopedia of Law and Procedure, 'on condition; by stipulation; the appropriate term for creating a condition precedent; sometimes used in the sense of "unless" '; in *Robertson v. Caw* (3 Barb., 410, 418), 'the appropriate term for creating a condition precedent'; in *Locke v. Carmers' Loan & Trust Co.* (140 N. Y., 135, 148), 'The word "provided" usually indicates a condition'; and to the same effect, *Brennan v. Brennan* (185 Mass., 560); in *Rich v. Atwater* (16 Conn., 408, 418), 'The proviso, it is said, requires such a construction. There has been much nice discussion upon the word "provided." 2 Co. 72 Cro. Eliz., 242, 385, 486, 560; Cro. Car., 128.* It is certain, as is said by *Swift, J.*, that there is no word more proper to express a condition than this word "provided," and it shall always be so taken, unless it appears from the context to be the intent of the parties that it shall constitute a covenant. *Wright v. Tuttle,* 4 Day (Conn.), 326.' Many authorities in other States might be cited to the same effect.

"Unquestionably the mortgagee clause constituted a new agreement between the insurance company and the mortgagee, and was attached to the policy for the purpose of enabling the mortgagor to perform the covenant of insurance contained in the mortgage, and in consideration of the taking of the policy by the mortgagor. It must be interpreted in such manner as to carry out the intention of the parties, and for that purpose the whole clause must be considered. While the mortgagee clause was for the benefit of the mortgagee in the respect before referred to, it was for the benefit of the insurance company in that it required the mortgagee to notify the company of any change of ownership or occupancy or increase of hazard which should come to his knowledge and to pay the premium for the increased hazard, otherwise the policy should be null and void. It also gave the insurance company, upon the payment of any sum to the mortgagee as loss or damage under the policy, the right, upon claiming that as to the owner no liability existed, to be subrogated to the extent of such payment, to all the rights of the mortgagee, or at its option to pay the mortgagee the amount of the mortgage and receive an assignment thereof and of all securities held as collateral to the mortgage debt.

"The apparent meaning of the mortgagee clause is that the insurance, as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor if the mortgagee shall on demand pay any unpaid premium, and hence that if the mortgagee shall on demand neglect or refuse to pay the unpaid premium he shall no longer be entitled to avail himself of the stipulation that no act or neglect upon the part of the mortgagor shall invalidate the policy, but the insurance of the interest of the mortgagee shall thereafter be governed by the policy itself, and this was doubtless the relation of the mortgagee and the insurance companies following the demand of the company for the payment of the premium in January, 1911, and the neglect of the mortgagee to pay the premiums."

In *Home Ins. Co. v. Union Trust Co.,* 40 R. I., 367, the Supreme Court of Rhode Island, after construing the two provisos, contained in the standard mortgage clause, as conditions subsequent, had the following to say in regard to the question now before us:

"Under this construction of the two provisos the effect of the mortgagee clause as a whole would be as follows: It would, as stated in the case of *Smith v. Union Insurance Co.,* 25 R. I., 260, constitute a separate contract between the insurance company and the mortgagee, entered into at the same time as the contract between the insurance company and the mortgagor and based upon the same consideration. While it would come into existence as soon as the policy was delivered, it would not become active until some default, by nonpayment of the premium or otherwise, had been made by the mortgagor. Then it would come into full force and effect and would give the mortgagee an independent right against the insurance company, which would, however, be subject to certain conditions subsequent. One of these would be that, if any part of the premium remained unpaid, the mortgagee would have to pay it upon demand or it would lose its rights under its independent contract, without being under any obligation to pay the unpaid premium if it preferred to let the policy lapse.

"This construction protects fairly the interests of the insurance company and the mortgagee. The insurance company is entitled to the payment of the premium on the delivery of the policy, and consequently has the power to protect itself fully, without recourse to the mortgagee. It is in a position at all times, with full knowledge of the facts in regard to the payment of premiums, to call for payment from the mortgagor, and, if dissatisfied, can cancel the policy by giving the prescribed notice. On the other hand, the mortgagee in many cases has no means of knowing whether the premium has been paid, and, as the insurance company must first make demand on the mortgagee for payment before rights of the mortgagee can be affected by the failure of the mortgagor to pay, it would impose an unreasonable burden on the mortgagee to require it to keep constant watch on the condition of the account between the insurance company and the mortgagor in order to protect itself from liability for unpaid premiums."

We concur in the opinion of the majority of the courts that the clause in question is a condition and not a contract or covenant. To hold otherwise would be to render the mortgagee liable for such premiums even after its interest in the mortgaged premises had expired, either by foreclosure or payment of the mortgage.

With respect to the rights of the mortgagee under the rider, as it is called, generally known as the New York standard mortgage clause, it was said in *Bank v. Ins. Co.,* 187 N. C., p. 102, "that this clause operates as a separate and distinct insurance of the mortgagee's interest, to the extent, at least, of not being invalidated by any act or omission on the part of the owner or mortgagor, unknown to the mortgagee; and, according to the clear weight of authority, this affords protection against previous acts as well as subsequent acts of the assured," citing authorities for the position.

It was held by a majority of the Court in *Johnson, Sansom & Co. v. Fort Worth State Bank,* decided by the Court of Civil Appeals of Texas in June, 1922, reported in 244 S. W., 657, that the insurance agent, plaintiff in the case, who had voluntarily paid the premium on the policies there in question, had no right of recovery against the mortgagee, in the absence of a contract or promise on the part of the latter to pay the same, and this upon the principle that no right of action arises to one who voluntarily pays money for another, without any agreement, express or implied, that it will be repaid. 21 R. C. L., 32.

It has often been said that the law will not aid a mere volunteer, or one who seeks to become a creditor without right or necessity for so doing. *Crumlish v. Central Improvement Co.,* 38 W. Va., 390, 23 L. R. A., 120, and note.

When the defendant positively refused and declined to pay the premiums, on demand, the plaintiff was at liberty to cancel the policies, or have them canceled, and thus save to himself the pro rata part of the premiums then unearned. His failure to do so, on the facts of the present record, cannot fairly be chargeable to the defendant.

The case of *Colby v. Thompson,* 16 Cal. App., 271, 64 Pac., 1053, cited by appellant, is distinguishable, for there the mortgagee, on being notified of the nonpayment of the premium, directed the agent not to cancel the policy, and promised, independent of the provisions in the standard mortgage clause, to pay the premium, in case the mortgagor failed to do so; and, in reliance on this promise, the policy was not canceled.

After a thorough consideration of the record, we are constrained to believe that the judgment of the Superior Court is correct and ought to be upheld.

Affirmed.

CONNOR, J., took no part in the consideration or decision of this case.

SWINDELL CLARK ET AL. v. W. W. CLARK ET AL.

(Filed 28 September, 1927.)

Wills—Devise—Heirs—Issue — Estates — Remainders — "Purchaser"— Tenants in Common.

A devise of testator's land to one who had been raised as a member of his family, with direction that should he die without heirs then the lands so devised "shall go back to my beloved wife or her nearest heirs at law: *Held*, upon the death of the devisee unmarried and without issue, leaving a brother and sister, and the death of the wife leaving heirs at law, the word heirs used in the devise to the son means "issue" or children, and the estate so devised went under the will of the testator to the heirs at law of the wife by purchase as tenants in common.

THIS was a special proceeding for the partition of land and heard on appeal by *Moore, Special Judge,* at May Term, 1927, of BERTIE.

Plaintiffs are the half brother of Amelia G. Williams and half sisters and descendants of a half sister, and the appealing defendants, W. W. Clark and H. B. Clark, are the whole brothers of said Amelia G. Williams.

Joseph G. Williams, the husband of Amelia G. Williams, died in 1906, leaving a last will and testament. The third and fifth items of said will are as follows: (Third) "I give and bequeath to Cleveland Williams or the young man that I raised from early childhood thirty-eight acres of land lying on the new road above mentioned, beginning at a corner, Simmon Cherry's line, and running thence along said road to the Lewiston and Windsor road, and thence along the said road towards Lewiston far enough to include the 38 acres, and running thence a straight line parallel with the new road to the back line adjoining Simmon Cherry's line; thence along Cherry's line to the beginning." (Fifth) "I further order and ordain that if . . . Cleveland Williams . . . should die without heirs that all of the real estate bequeathed to them by this my last will and testament, shall go back to my beloved wife or her nearest heirs at law."

Cleveland Williams died intestate in November, 1924, without "ever having married, and left no issue." Amelia G. Williams, the wife of testator, is also dead. At the time of his death Cleveland Williams left brothers and sisters.

The court adjudged that the heirs at law of Amelia G. Williams were the sole owners of the property in controversy. From this judgment the defendants, H. B. Clark and W. W. Clark, appealed.

H. G. Harrington and Winston, Matthews & Kenney for plaintiffs.
Craig & Pritchett for defendants.

BROGDEN, J. Where real estate is devised to "nearest heirs at law" of a person leaving brothers and sisters of whole blood and half blood, do such brothers and sisters take equally, or do the brothers and sisters of the whole blood take the entire interest to the exclusion of the half blood?

Under the fifth item of the will of Joseph G. Williams it was provided that, if Cleveland Williams "should die without heirs," all the real estate bequeathed to him "shall go back to my beloved wife *or her nearest heirs at law.*" Amelia G. Williams, wife of testator, died, leaving a half brother, two half sisters, and the children of a deceased half sister, and also leaving two brothers. The brothers of the whole blood claim that they are the "nearest heirs at law" of Amelia G. Williams, and that therefore they take the entire property.

The expression in the fifth item of the will that if Cleveland Williams "should die without heirs" means that in the event Cleveland Williams should die without issue, the land devised to him should go to the "nearest heirs at law" of Amelia G. Williams. *Massengill v. Abell,* 192 N. C., 240.

Under the decisions of this Court the "nearest heirs at law" of Amelia G. Williams, under the will as written, take as purchasers under the will of Joseph G. Williams and not by descent. *Kirkman v. Smith,* 174 N. C., 603; *Yelverton v. Yelverton,* 192 N. C., 614.

As the "nearest heirs at law" of Amelia G. Williams take by purchase and not by descent, then it follows that her brothers and sisters of the half and whole blood take equally as tenants in common, and the judgment of the trial judge is correct.

Affirmed.

A. L. PRIDGEN v. M. R. GIBSON.

(Filed 28 September, 1927.)

Evidence—Expert Opinion—Physicians and Surgeons—Witnesses — Appeal and Error—Discretion of Court—Reversal.

A general practitioner as a physician may qualify as an expert to give his opinion as such in a personal injury case for alleged malpractice, though he may not have specialized in that particular field in this case as an oculist; and where the trial judge has held him to be disqualified as a matter of law on this ground alone, his judgment does not fall within his discretion, and is reviewable on appeal.

APPEAL by plaintiff from *Grady, J.,* at May Term, 1927, of WARREN. Reversed.

This was a civil action brought by the plaintiff to recover damages for the loss of an eye alleged to have been caused by the negligence of the defendant. The material allegations in the complaint may be abridged. The defendant and Dr. C. E. Foley were associated as copartners under the name of Gibson & Foley Clinic, with offices in the city of Raleigh, and were engaged as practitioners in treating diseases of the eye, ear, nose, and throat. The plaintiff is a carpenter, and while doing some work on 24 February, 1925, he struck the head of a hatchet with a hammer, thereby causing a small piece of steel to lodge in the back part of his eye. On the advice of a local physician he consulted the defendant, by whom his eye was examined with a microscope used in connection with a small electric bulb, but not with an X-ray machine, which was then available. The defendant negligently and wrongfully assured the plaintiff that by using the microscope he could examine all parts of his eye, and told him after the examination there was nothing in it; and although the plaintiff insisted that a particle had lodged in and had injured his eye, the defendant negligently allowed it to remain there until it was discovered by another through the use of an X-ray machine. The plaintiff then consulted a specialist in New York, who removed the steel, but not until it was too late to save the sight. It is alleged that the loss of the eye was proximately caused by the defendant's failure to use due care and to exercise reasonable judgment in the examination and treatment of the injured eye.

The defendant denied the material allegations of the complaint and alleged that the treatment given the plaintiff was such as is usual and customary in cases of this character, and such as the defendant administered in the exercise of his best judgment; and further that the loss of sight was due to the injury itself and not to any treatment or lack of treatment on the part of the defendant.

At the conclusion of the evidence the trial court dismissed the action as in case of nonsuit, and the appeal is prosecuted for a reversal of the judgment upon errors assigned in the record.

Williams & Banzet and John H. Kerr for plaintiff.
George C. Green for defendant.

Adams, J. If the appellant can maintain the position that the trial court excluded relevant and material evidence to which he was entitled, the judgment dismissing the action must be reversed. Whether competent evidence was excluded is the question to be considered.

For the purpose of establishing certain allegations in the complaint the appellant introduced as his witnesses three practicing physicians (Dr. MacRae, Dr. Peete, and Dr. Hunter), and propounded to each some questions which were hypothetical and others which, though not based upon assumed facts, were intended to elicit answers relating to matters of science, but his Honor held that the proposed evidence was not admissible because the witnesses were not experts.

This Court has insistently upheld the general propositions that with respect to special skill or experience the competency of a witness is to be determined by the court as a question preliminary to the admission of evidence, and that when objection is made to the testimony of a witness who is offered as an expert, there must be a finding by the court or an admission or a waiver by the adverse party that the witness is qualified, such determination being to a degree a matter of judicial discretion. *Flynt v. Bodenhamer,* 80 N. C., 205; *Blue v. R. R.,* 117 N. C., 644; *Lumber Co. v. R. R.,* 151 N. C., 217; *Boney v. R. R.,* 155 N. C., 95. It is not our purpose to impair the force of this practical and salutary rule, but rather to apply the principle that the preliminary question is subject to review by the appellate court when it is obviously made to turn upon error in law, for by rules of law the qualifications necessary to enable witnesses to testify as experts are prescribed as well as ascertained. *Davis v. State,* 44 Fla., 32; *Perkins v. Stickney,* 132 Mass., 217. The record does not reveal the grounds upon which the physicians examined on behalf of the plaintiff were declared not qualified to testify as expert witnesses, but we were informed during the argument (and it appears in the appellant's brief) that the reason assigned was their failure to show that they were specialists in the treatment of the eye. Indeed, a considerable part of the appellant's argument here was addressed to this proposition.

Whether an expert is necessarily a technical specialist, or, expressed differently, whether none but a specialist can testify as an expert, is not a matter of judicial discretion the exercise of which by the trial court is final; it is a question of law which is subject to review by the appellate tribunal. In *Dole v. Johnson,* 50 N. H., 453, it is said that the irreversible discretion of the court must be limited by the rules of law, and that before the court, in its discretion, can be permitted to determine the fact whether the witness is qualified to give an opinion, it must be established as matter of law that he comes within the legal category or is included among experts. He may be wrongfully excluded through an erroneous conception of the law. If a physician who is duly licensed by the proper authorities to engage in the general practice of his profession says that assuming a hypothetical statement of facts to be true he can express an opinion satisfactory to himself as to a question of science pertaining to a particular branch of medicine, he is not precluded from testifying as an expert simply because he is not a technical specialist in that particular department. The word "expert" has been variously defined: "A man of science"; "a person conversant with the subject-matter"; "a person of skill"; "a person possessed of science or skill respecting the subject-matter"; "one who has made the subject upon which he gives his opinion a matter of particular study, practice, or observation." The basic theory is that the opinions of experts are admissible on questions of science, skill, or trade, or on questions which so far partake of the nature of a science as to require a course of previous study, not necessarily technical specialization in any department. *Jones v. Tucker,* 41 N. H., 547.

In his work on Expert Testimony, 99, 101, Rogers says the principle is established that physicians and surgeons of practice and experience are experts in medicine and surgery, and that their opinions are admissible in evidence upon questions that are strictly and legitimately embraced in their profession and practice; also that it is not necessary that the medical witness should have made a specialty of the particular disease which is the subject of inquiry. Lawson, reaching the same conclusion, observes that a physician or surgeon need not have made the particular disease involved in any inquiry a specialty as prerequisite to the admission of his testimony as that of an expert, but if he has made the subject a specialty his opinion may be of more value than it would have been if he had not. Expert and Opinion Evidence (2 ed.), 136. Greenleaf states the result of his research in these words: "On matters in which special medical experience is necessary, the question may arise whether a general practitioner will suffice, or whether a specialist in the particular subject is necessary. The courts usually and properly repudiate the finical demand for the latter class of witnesses."

The principle enunciated by these writers and supported by the utterance of many courts of last resort represents the prevailing doctrine and must be regarded as a determining factor in passing upon the appellant's exceptions. *Valmas Drug Co. v. Smoote,* 269 Fed., 359; *Hathaway's Admr. v. Nat. Life Ins. Co.,* 48 Vermont, 351; *Olmsted v. Gere,* 100 Pa. St., 127; *Bates v. Fluharity's Guardian,* 201 S. W., 10; 22 C. J., 526, sec. 610.

Dr. Neill MacRae testified that he was a graduate of the University College of Medicine, in Richmond, Virginia; that he had studied the structure of the eye and the anatomy of the body; that he had been engaged in the practice of medicine for twenty-seven years, and further: "From my knowledge of medicine and the structure of the eye I think I know what is the proper thing to do if there is a foreign body in the eye, based upon the facts." This was equivalent to testimony that upon an assumed statement of facts he could form an opinion satisfactory to himself as to the manner in which an injured eye should be treated *(Blue v. R. R., supra);* and, plainly, he was a physician of experience, for, as remarked by *Smith, C. J.,* if a regular and continuous practice in his profession for thirty years does not entitle the witness to be regarded as an expert, or experienced physician, it is difficult to conceive what would do so. *Flynt v. Bodenhamer, supra.* True, on cross-examination the witness said he had had only a general and not a special practice in the treatment of the eye; that he was not a specialist in anything, but only a country doctor whose practice had been confined to "ordinary country diseases." These facts would no doubt be considered by the jury in estimating the probative value of his testimony; but if, as in substance he said, he could form an opinion satisfactory to himself upon assumed facts as to the proper method of treating the eye, the mere circumstance that he was not a specialist in this particular field would not as a matter of law disqualify him from expressing an expert opinion. If the ruling had been put upon the broad ground that his professional knowledge and training were not such as to satisfy the court of his competency to testify as an expert witness it is not improbable (in the absence of abuse or palpable error) that a case of "irreviewable discretion" would have been presented; but to say that a witness may not express an expert opinion unless he can qualify as a specialist raises an entirely different question. On another trial this matter may be settled by a specific statement of the ground upon which the finding is made to rest. The same principle applies to his Honor's disposition of the testimony of Dr. Peete and Dr. Hunter. We need not declare whether if either of these witnesses had testified as an expert all his proposed testimony as it appears in the record would have been competent; we find upon inspection that parts of it have a direct bearing upon the issues raised by the pleadings in the cause.

The judgment of nonsuit is reversed to the end that there may be a new trial.

Reversed.

STATE OF NORTH CAROLINA, UPON RELATION OF F. G. GOWER, v. C. W. CARTER.

(Filed 28 September, 1927.)

1. Quo Warranto—Title—Public Office—Actions—Statutes.

A civil action in the Superior Court is the proper procedure to try the title to a public office between two rival claimants, when one of them is in possession under a claim of right and exercising the official functions thereof. C. S., 2671.

2. Same—Elections—Burden of Proof.

The burden of proof is on the plaintiff in *quo warranto* to show that the one in possession was not entitled thereto by reason of a number of unlawful votes that had been cast for him, and that otherwise the plaintiff would be entitled thereto, and this is not shown when by rejecting certain votes cast for the defendant an even number of votes had been cast for each one. C. S., 2671.

3. Same—Domicile.

Where the plaintiff in an action in the nature of *quo warranto* to try title to a local public office within the county, has shown that each party had received the same number of votes for the office and depends upon the illegality of one of the votes cast for the present incumbent, evidence tending to show that this voter was domiciled or resident in another county and had only a temporary residence in that of the election, with the *animus revertendi*, is erroneously excluded.

4. Same—Constitutional Law—Statutes.

Under our Constitutional provisions, Art. VI, secs. 2 and 3, as to the qualifications of voters and the time of their residence at the place of the election held, requiring registration, etc., and the statutes passed in pursuance thereof, C. S., 2654, 2665, the qualification of voters in a municipal election is the same as in a general one, and applies in an action in the nature of a *quo warranto* to try the title to the office of mayor of a town when contested by a rival claimant.

5. Same—Residence—Animus Revertendi.

In order for a voter to cast his ballot in a municipal election to the office of mayor of the town, it is necessary for the contestant to show where there is a tie vote between two rival claimants that the domicile of a voter, whose vote will vary the result, was elsewhere, and it may be shown by direct or circumstantial evidence that in fact his domicile or residence was not at the place he had cast his vote, but at another place, with the *animus revertendi.*

6. Evidence—Nonsuit—Statutes.

A motion by defendant as of nonsuit upon the evidence, C. S., 567, will be denied if the evidence, taken in the light most favorable to the plaintiff, and every reasonable intendment or inference to be drawn therefrom tends to maintain his right.

APPEAL by plaintiff from *Harris, J.*, at June Term, 1927, of JOHNSTON. Reversed.

Parker & Martin and Paul D. Grady for plaintiff.
W. H. Lyon, Roy Carter and J. W. Bailey for defendant.

CLARKSON, J. This is a civil action in the nature of *quo warranto,* to try the title to the office of mayor of the town of Clayton, Johnston County.

In *Harkrader v. Lawrence,* 190 N. C., at p. 442, it is said: "This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the Superior Court in this behalf has never been abdicated in favor of the board of county canvassers or other officials of an election. *Rhodes v. Love,* 153 N. C., 469; *Johnston v. Board of Elections,* 172 N. C., 162, 167."

Defendant in his brief says: "The official returns in the election for mayor of Clayton showed 238 votes for F. G. Gower and 239 votes for C. W. Carter. The latter was declared elected; F. G. Gower brought the action, alleging that certain votes counted for C. W. Carter were illegal. It is conceded that plaintiff produced evidence tending to show that Joseph Romanus was not a qualified voter, and that he voted for C. W. Carter. This makes a tie. But a tie is not resolved by an action in the nature of *quo warranto*—the statute provides otherwise. C. S., 2671. The burden, therefore, was upon contestant, Gower, to show one more illegal vote for C. W. Carter."

The plaintiff in his complaint charges that of the 239 votes cast for defendant, C. W. Carter, fifteen were illegal voters and gives the names of each and why they were not entitled to vote. It is admitted on the record that Joseph Romanus, who was born in Lebanon, near Jerusalem, was not a naturalized citizen and not entitled to vote.

For a decision of the case, it is only necessary to consider the vote of Eloise Sparger. The evidence is as follows:

J. B. Sparger testified as follows: "Lives in Mount Airy; has a daughter named Eloise Sparger; she is in Mount Airy, and is too sick to attend court; she was served with a subpœna to be here. He has lived at Mount Airy for sixty odd years; his daughter was born and reared at Mount Airy. She is twenty-two or three years old. She went to Clayton to teach school. Last year was her first year.

Q. Did she have any other purpose in going to Clayton, except to teach school? Defendant objects; sustained, and plaintiff excepts. She had not taught school before last year, but had attended school.

Q. When she is not engaged in teaching school or attending school, where does she stay and make her home? Defendant objects; sustained, and plaintiff excepts. She stayed in Clayton about nine months; went there about the beginning of the school and left immediately after the school closed. She came home to Mount Airy about 1 June; she spends her vacations at my home in Mount Airy. She spends her time at my home except when she is away visiting, teaching school or going to school. I had heard her state for whom she voted in the Clayton election." The above questions were competent.

D. M. Price testified as follows: "That he stayed around the polls at the election in Clayton on 3 May nearly all day; *he saw Eloise Sparger go to the polls and vote;* she took her ticket for mayor from the Carter pile—got her ticket off the Carter pile. He saw her put it in the box. (Cross-examination.) He was at the house where the election was being held when she voted. There was a pile of tickets for each of the two men running for mayor. He did not look to see whether there were any Carter tickets in the Gower pile or any Gower tickets in the Carter pile. There were not supposed to be any. *He saw the sort of ticket she actually got, saw her when she took it up and saw C. W. Carter's name on it;* he was not there all day, but was there the biggest part of the day."

The Constitution of North Carolina, Art. VI, sec. 2, in part says: "*Qualifications of voters.* He shall reside in the State of North Carolina for one year, and in the precinct, ward, or other election district, in which he offers to vote four months next preceding election: *Provided,* that removal from one precinct, ward or other election district to another in the same county shall not operate to deprive any person of the right to vote in the precinct, ward or other election district from which he has removed until four months after such removal," etc.

Sec. 3. "*Voters to be registered.* Every person offering to vote shall be at the time a legally registered voter as herein prescribed and in the manner hereafter provided by law, and the General Assembly of North Carolina shall enact general registration laws to carry into effect the provisions of this article."

C. S., 2654, in part, is as follows: "*Registration of voters.* It shall be the duty of the board of commissioners of every city and town to cause a registration to be made of all the qualified voters residing therein, under the rules and regulations prescribed for the registration of voters for general elections."

C. S., 2665: "All qualified electors, who shall have resided for four months immediately preceding an election within the limits of any voting precinct of a city or town, and not otherwise, shall have the right to vote in such precinct for mayor and other city or town officers."

The qualifications for voting in a municipal election are the same as in the general election. *Echerd v. Viele,* 164 N. C., 122.

In *Roberts v. Cannon,* 20 N. C., at p. 269, it is said: "It may not be amiss to remark that by a residence in the county, the Constitution intends a domicile in that county. This requisition is not satisfied by a visit to the county, whether for a longer or a shorter time, if the stay there be for a temporary purpose, and with the design of leaving the county when that purpose is accomplished. It must be a fixed abode therein, constituting it the place of *his home.* This residence or domicile is a fact not more difficult of ascertainment, when required as the qualification of a voter, than residence or domicile at the moment of a man's death, which is so important in regulating the disposition and management of his estate after death."

In *Hannon v. Grizzard,* 89 N. C., at p. 120, it is said: "Residence, as the word is used in this section in defining political rights, is, in our opinion, essentially synonymous with domicile, denoting a permanent as distinguished from a temporary dwelling-place. There may be a residence for a specific purpose, as at summer or winter resorts, or to acquire an education, or some art or skill in which the *animus revertendi* accompanies the whole period of absence, and this is consistent with the retention of the original and permanent home, with all its incidental privileges and rights. Domicile is a legal word and differs in one respect, and perhaps in others, in that, it is never lost until a new one is acquired, while a person may cease to reside in one place and have no fixed habitation elsewhere." *Chitty v. Parker,* 172 N. C., p. 126; *Reynolds v. Cotton Mills,* 177 N. C., 412; *Groves v. Comrs.,* 180 N. C., 568; *S. v. Jackson,* 183 N. C., 695; *In re Ellis,* 187 N. C., 840. See *Ransom v. Comrs. of Weldon, ante,* 237.

In *Boyer v. Teague,* 106 N. C., at p. 631-2, it is said: "The jury were allowed, properly, to say whether George Foy was a resident of Forsyth County. He left the home of his parents in Rockingham, where he had certainly become a resident, every summer, to work in the tobacco factories, and left when the season was over. The fact that he stated that he considered Winston his home did not settle the question of law. The jury were at liberty to conclude, from his own statement, that he had never abandoned, at any time, the idea of returning to his father's house when the season was over, and had never lost his right to vote in Rockingham County."

The fact as to the residence or domicile of a person at a given time may be proved by direct or circumstantial evidence. The intention of the person may be shown by his acts, declarations and other circumstances.

The court below sustained the motion of defendant for judgment as in case of nonsuit, C. S., 567, to which plaintiff excepted and assigned error. The motion should have been refused. On a motion of defendant to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

There was sufficient evidence to be submitted to the jury (1) that Eloise Sparger at the time she voted was a resident or domiciled at Mount Airy, (2) that she voted for defendant. The probative force is for the jury to determine. The judgment below is

Reversed.

J. P. JOHNSON v. J. J. PITTMAN AND R. L. PITTMAN.

(Filed 28 September, 1927.)

1. **Bills and Notes—Consideration — Criminal Law — Threats — Public Policy—Actions.**

   Where the plaintiff has obtained the signature of the defendant on a promissory note jointly with his brother, under a threat to have the latter indicted at once for giving plaintiff an unhonored check on the bank, without duress, and the plaintiff in consequence has abandoned a suit in which attachment proceedings had been issued against the defendant's brother and another in whose possession the property attached was at the time: *Held*, the bare threat against the defendant's brother did not amount to compounding a felony or stifling a criminal prosecution, and the note itself being founded upon a sufficient legal consideration is valid and enforceable against the defendant.

2. **Same—Pleadings—Issues—Instructions—Appeal and Error.**

   Issues should arise from the pleadings in the cause, and where it is alleged in the answer that the note sued on was obtained under an agreement that was unlawful and the note therefore unenforceable, the submission of an issue as to whether the note in suit was obtained from the defendant to prevent a criminal prosecution is insufficient, did not arise from the pleadings and is reversible error, and an instruction predicated thereon is also error.

CIVIL ACTION, before *Harris, J.*, at February Term, 1927, of HARNETT.

The plaintiff instituted this action against J. J. Pittman and his brother, R. L. Pittman, to recover upon a promissory note for $3,112.50 executed by the defendants to the plaintiff.

The evidence tended to show that on or about 29 December, 1924, plaintiff sold and delivered to the defendant, J. J. Pittman, sixty-nine bales of cotton. J. J. Pittman gave in payment for the cotton a check drawn on the Merchants and Farmers Bank of Fayetteville for the sum of $7,757.52. The plaintiff presented the check in due course for payment and the same was protested. Thereupon, on 1 January, plaintiff instituted a suit against J. J. Pittman, Weatherford-Crump Co., Southern Railway Co., and Farmers and Merchants Bank of Fayetteville, and issued a warrant of attachment and claim and delivery. J. J. Pittman had consigned the cotton to Weatherford-Crump Company, and it had been delivered to the Southern Railway for transportation and was then in transit. J. J. Pittman paid the plaintiff approximately $4,646.00, leaving a balance due of $3,112.50. The defendant Pittman testified that the Weatherford-Crump Company had deducted something over $3,000 from his draft to cover shortage in weight of cotton sold by him on prior occasions to said Weatherford-Crump Company, and that this was done without his knowledge or consent, and for this reason his check was not good.

After the civil action had been instituted by the plaintiff he telephoned the defendant, R. L. Pittman, to know if he could tell him anything as to the whereabouts of his brother, J. J. Pittman. R. L. Pittman testified that the plaintiff told him "that he had had a lot of trouble about a cotton transaction he had with him (J. J. Pittman), had a check returned unpaid, and that he had to have his money, and if he did not have it by the next day or something to take the place of it that he was going to indict him (J. J. Pittman), have him arrested and put in jail. . . . On the following morning he called me again and told me that unless he had the money or that matter was arranged by 2 o'clock that he would see that he (J. J. Pittman) was arrested and put in jail, and that if he wanted to take the matter up further that he could do so with his attorneys, Clifford & Townsend. In the meantime my brother came in from Charlotte on the 11:45 train that day. I signed a note for nothing in the world except to keep my brother from being arrested and put in jail. I received nothing of value and did not owe the plaintiff anything. I signed the note about 12 o'clock. He had given us until 2 o'clock to get the matter closed with his attorneys, and my brother carried the note to Lillington the same day and delivered it to Mr. Young, attorney for defendants, with instructions to deliver it to Clifford & Townsend, attorneys for plaintiff."

When the note fell due the defendant, R. L. Pittman, asked for an extension of time. This was granted and the defendants executed a renewal note. When the note fell due a second time the defendant, R. L. Pittman, again requested and received indulgence, and signed a renewal note, dated 15 July, 1925, and due 15 October, 1925, which is the note upon which the suit was brought. In October, 1925, the defendant Pittman refused to pay the note, alleging that the consideration thereof was illegal and against public policy, and that the note was void. J. J. Pittman, who purchased cotton from the plaintiff, is insolvent.

The issues and answers of the jury thereto are as follows:

1. Did the defendant, R. L. Pittman, execute the note sued upon to prevent a criminal prosecution of his brother, J. J. Pittman, threatened by the plaintiff? A. Yes.

2. Was the indebtedness represented by the note sued on contracted through the false and fraudulent representations of J. J. Pittman, as alleged in the complaint? A. No.

3. If so, what damages did the plaintiff sustain thereby? A. $3,112.50.

4. Did the defendants fraudulently conspire and confederate together, and thereby induce the plaintiff to accept their joint note for the indebtedness of J. J. Pittman with no bona fide intention of paying said note, and thereby induce the plaintiff to take a nonsuit in the case of J. P. Johnson against the Southern Railway Company, and others, thereby surrendering securities held by the Southern Railway Company and Weatherford-Crump Company, one or both, to the damage of the plaintiff? A. No.

5. If so, what damages is the plaintiff entitled to recover on account of the same? A. ....

From judgment upon the verdict plaintiff appealed.

J. C. Clifford for plaintiff.
Young & Young for R. L. Pittman.

Brogden, J. Is a bare threat to procure a warrant or to have a person arrested upon a criminal charge sufficient to invalidate a note given for a valid debt, arising out of contract?

There is no allegation of duress in the complaint and no evidence thereof in the record except the threat made by the plaintiff to have the defendant, J. J. Pittman, arrested. So that the inquiry is narrowed to the sole question as to whether or not the threat made by the plaintiff constitutes compounding a felony or stifling a criminal prosecution, or obstructing the full and free exercise of the law with respect to the particular case and the unhampered and unhindered application of the law to trial and punishment of the accused. It is a general rule of law in this jurisdiction, running like a golden thread through the decisions from *Smith v. Greenlee,* 13 N. C., 126, to *Aycock v. Gill,* 183 N. C., 271, that all executory agreements to compound felonies, to stifle criminal prosecutions of any and all kinds; to suppress evidence or to hinder or retard the full weight and the free course of the criminal law are contrary to good morals, enlightened conscience and public policy, and therefore void; and further that all notes or bonds given in recognition of such and upon such illegal consideration are invalid and not collectible.

There are many decisions of this Court declaring the invalidity of executory contracts of this nature.

Agreements which have been held void in this State as contrary to public policy may be classified as follows:

1. To chill bidding at a public sale or to retard or paralyze open and fair competition. But the rule does not extend so far as to prevent several individuals from uniting in their bidding, if it is done in good faith and without an inequitable or illegal purpose. *Smith v. Greenlee,* 13 N. C., 126; *Blythe v. Lovingood,* 24 N. C., 20; *Bailey v. Morgan,* 44 N. C., 352; *Ingram v. Ingram,* 49 N. C., 188; *King v. Winants,* 71 N. C., 469; *Henderson-Snyder Co. v. Polk,* 149 N. C., 104.

2. To assent to a *nol. pros.* of a criminal case in consideration of the payment of a sum of money. *Comrs. v. March,* 89 N. C., 268.

3. Not to prosecute for crime. *Garner v. Qualls,* 49 N. C., 223.

4. Not to appear as a witness against the accused. *Thompson v. Whitman,* 49 N. C., 48; *Vanover v. Thompson,* 49 N. C., 486.

5. To settle the estate of an intestate without taking out letters of administration, or taking the oath required or giving bond. *Sharp v. Farmer,* 20 N. C., 122.

6. Giving a note for purchase price of stock in a railroad, for purpose of enabling the company to secure state funds, with agreement that note was not to be paid. *McRae v. R. R.,* 58 N. C., 395.

7. Securing a note and mortgage from a mother upon agreement not to prosecute her son. *Corbett v. Clute,* 137 N. C., 546.

8. To "request court to be as lenient as possible" with one accused of crime or to mitigate the punishment. *Aycock v. Gill,* 183 N. C., 271.

9. To withdraw a pending indictment. *Lindsay v. Smith,* 78 N. C., 328.

In other jurisdictions the following executory agreements have been held void as contrary to public policy:

1. To destroy the evidence in a criminal case, to wit, a bottle of liquor. *S. v. Carver,* 69 N. H., 216; 39 Atl., 973.

2. To have a husband discharged from arrest if the wife would execute a note. *Jones v. Dannenberg Co.* (Ga.), 37 S. E., 729.

3. Not to have the defaulting cashier of a bank arrested. *American National Bank v. Helling* (Minn.), 202 N. W., 20.

4. Not to prosecute for purchasing stolen hides. *Fred Rueping Leather Co. v. Watke* (Wis.), 116 N. W., 174.

5. Promise to sign or be more likely to sign a petition for mitigation of punishment. *Buck v. Bank,* 27 Mich., 293.

In all the cases in North Carolina it appears that in each instance when the executory contract was made that there was an unlawful agreement, and this unlawful agreement, express or reasonably implied from all the circumstances, constituted the corrupting and invalidating vice of the transaction.

The various angles and aspects of the question are discussed in an exhaustive annotation found in 17 A. L. R., 325.

Our conclusion based upon all the decisions in this State, and also upon a large number of decisions in other jurisdictions, is that the mere threat of arrest contained in the present record does not of itself render the note in controversy void.

The first issue was submitted to the jury over the objection of plaintiff. This objection is sustained. The issue omitted the essential element of unlawful agreement between the parties at the time the note was executed. The issue submitted in *Corbett v. Clute, supra,* contains the essential elements prescribed by the law in such cases. Furthermore, the defendant alleged in the answer that the plaintiff "promised the defendant and the said J. J. Pittman that if the defendant would execute and deliver to the plaintiff the said note covering the amount of the alleged claim and the shortage on the part of said J. J. Pittman, that the plaintiff would not institute said criminal action and indictment against the said J. J. Pittman, but would forbear from said action. Issues ordinarily arise upon the pleadings, and the form of issue submitted did not present the question as set up in the pleadings.

The judge charged the jury: "(Now the defendant, R. L. Pittman, says that he is not liable on this note for the reason that he executed this note for the purpose of saving and keeping his brother, J. J. Pittman, from being arrested and put in jail, and that that was the only consideration for which he signed this note, and no other.

Now, the court will charge you, gentlemen, in the outset that if you believe by the greater weight of the evidence—the burden being on the defendant, R. L. Pittman, to satisfy you by the greater weight of the evidence—that that was the consideration for which he signed this note and nothing else, that the law says that is against public policy, and he would not be liable on this note. If you believe by the greater weight of the evidence that was the only consideration for which he signed, namely, that he signed it in order to keep his brother, J. J. Pittman, from being arrested and put in jail; if you are not so satisfied by the greater weight of the evidence, then you would find that he is liable on this note which he executed and signed; that is his only defense, and if so, he was not liable and ought not to pay it, and judgment could not be rendered against him, if he signed it for that reason and that reason only."

The plaintiff excepted to the charge and the exception is sustained.

The vital question in the case was not whether the defendant, R. L. Pittman, was desirous of keeping his brother out of jail, but whether or not he endorsed the note for his brother by reason of an unlawful agreement.

Upon consideration of the entire record, we hold that the plaintiff is entitled under the law to a

New trial.

TOWN OF NEWTON, R. P. CALDWELL AND EVERETT LONG, TAXPAYERS OF CATAWBA COUNTY, v. STATE HIGHWAY COMMISSION.

(Filed 5 October, 1927.)

1. **Roads and Highways—State Highway Commission—Appeal and Error—Agreement of Parties—Constitutional Law—Statutes.**

Where the Supreme Court has delivered an opinion upon the authority of the State Highway Commission as to change of route of a highway connecting two county-seats, a petition in the cause, although at the request of both plaintiff and defendant, cannot be entertained, the same not being authorized either by our Constitution or statutes in conformity therewith. Const. of N. C., Art. IV, secs. 8, 9; C. S., 1411.

2. **Same.**

Where it is a matter of much general public interest, and the court below finds the fact that there is no substantial departure, an approval is permissible under the decisions.

THIS is a petition made by both plaintiffs and defendant in the above-entitled case. See *Newton v. Highway Commission, ante,* p. 159.

W. C. Feimster, W. A. Self, Wilson Warlick and Clyde R. Hoey for plaintiffs.

Assistant Attorney-General Ross for defendant.

CLARKSON, J. The joint petition made by both plaintiffs and defendant is as follows:

"*First.* That, in the opinion filed by this Court on 25 June, 1927, the defendants were enjoined from abandoning the existing road in Catawba County, designated as a portion of State Highway No. 10, as now located and maintained.

Second. That, in a suit lately pending in Catawba County, between the same parties litigant, and involving the building of certain State highways in said county, all matters in controversy between the parties were amicably settled, subject to the approval of the court, and an agreed judgment was entered, copy of which is annexed hereto and made a part of this petition.

Third. That it is the desire and intention of the parties that the route from Catawba River to Newton, described in said agreed judgment and shown on the map annexed hereto, shall, when completed, be substituted for the existing and maintained location of Route No. 10, and, in order that this agreement may be carried out, your petitioners are advised and believe that it was necessary that the injunctive relief granted by the court on 25 June, 1927, be modified.

Wherefore, your petitioners now pray and move the court that the said cause be reopened by this Court and that the injunctive relief therein granted be modified to such extent as may be necessary to permit the agreed settlement between the parties to be carried out."

Const. of N. C., Art. IV, sec. 8, is as follows: "The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said Court over 'issues of fact' and 'questions of fact' shall be the same exercised by it before the adoption of the Constitution of one thousand eight hundred and sixty-eight, and the Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." C. S., 1411.

"Sec. 9. The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

In *R. R. v. Horton,* 176 N. C., at p. 117, it is held: "This Court, having certified its opinion and remanded the case to the court below, is without jurisdiction to make any orders therein. It might have been brought before this Court by petition to rehear, if filed in forty days after the opinion, in compliance with Rule 52 of this Court (174 N. C., 841), but this was not done. . . . (P. 118.) This Court is solely an appellate Court, except as to claims against the State; and when a decision on appeal has been rendered and certified, the jurisdiction of this Court is at an end. *James v. R. R.,* 123 N. C., 299; *Finlayson v. Kirby,* 127 N. C., 222; *White v. Butcher,* 97 N. C., 7." Const. of N. C., Art. IV, secs. 8 and 9, *supra; Cooper v. Comrs.,* 184 N. C., 615; *Dredging Co. v. State,* 191 N. C., 243; Rule of Practice in the Supreme Court, Rule 44, in 192 N. C., p. 858. See, also, annotation under C. S., 1419.

Under the well-settled law of this jurisdiction, this Court cannot entertain the petition in the form as presented.

The matter is of much general public interest. The road is a link, or part, of No. 10, one of, if not, the most important road in the State.

The road agreed upon, from Catawba to Newton, and approved by Judge Michael Schenck, as shown by the judgment and map attached, is substantially the same as indicated by the exhibits in the first *Newton case,* 192 N. C., p. 54, approved by Judge James L. Webb, which judgment was affirmed on appeal to this Court.

In the instant case, Judge Schenck, the careful and learned judge who heard the case, had all the evidence before him, and it is presumed that the facts found by him support the judgment in the absence of appeal or objections. Therefore, upon the face of the record, we see no reason why the judgment rendered by the judge below should not be approved. This course has been pursued in a number of cases in this State and permissible under our decisions. *Milling Co. v. Finlay,* 110 N. C., 411; *S. v. Wylde, ibid.,* p. 500; *Gilbert v. Shingle Co.,* 167 N. C., 286; *Cement Co. v. Phillips,* 182 N. C., 437; *Corporation Com. v. Mfg. Co.,* 185 N. C., 17; *S. v. Carroll, ante,* 37.

Petition dismissed.

W. C. WHITE v. H. P. WHITEHURST, RECEIVER OF BANK OF VANCEBORO, AND THE NATIONAL BANK OF NEW BERN.

(Filed 5 October, 1927.)

Banks and Banking—Bills and Notes—Payment—Bank Purchasing Its Own Shares of Stock—Statutes—Consideration—Collateral.

A bank may not cancel a note made to it in consideration of shares of its stock delivered to it by the maker of the note he had purchased from another, it not appearing that the maker of the note thus canceled was insolvent, or that the transaction was necessary to prevent loss to the payee bank, and payment so made is not a valid defense in the hands of another bank to which the note had been endorsed before maturity by the payee bank as collateral security. 3 C. S., 220(t); C. S., 224; Laws of 1921, ch. 4, sec. 45.

APPEAL by plaintiff from *Cranmer, J.,* at February Term, 1927, of CRAVEN. No error.

Action to have note for $500, executed by plaintiff, payable to the Bank of Vanceboro, and now held by the National Bank of New Bern, canceled and delivered to plaintiff, upon his allegation that same has been paid. Defendants deny this allegation. The National Bank of New Bern prays that it recover of plaintiff upon said note the sum of $500 and interest, together with its costs.

Issues submitted to the jury were answered as follows:

"1. Did plaintiff pay the note as alleged in the complaint? Answer: No.

2. If so, is plaintiff entitled to have the note delivered up and canceled? Answer: No.

3. If not, what amount, if any, is plaintiff entitled to recover from the receiver? Answer: Nothing.

4. Is the defendant, National Bank of New Bern, the holder of said note in due course? Answer: Yes.

Upon the foregoing verdict, judgment was rendered (1) that plaintiff take nothing by his action; (2) that the National Bank of New Bern recover of the plaintiff the sum of $500, with interest and costs.

From this judgment plaintiff appealed to the Supreme Court.

D. L. Ward for plaintiff.

H. P. Whitehurst and Ward & Ward for defendants.

CONNOR, J. On 7 April, 1923, plaintiff executed his note in the sum of $500, payable to the order of the Bank of Vanceboro. On 13 December, 1923, the Bank of Vanceboro was adjudged insolvent, and the defendant, H. P. Whitehurst was duly appointed as its receiver. The said note, prior to its maturity, was endorsed by the Bank of Vanceboro, and deposited with the National Bank of New Bern as collateral security.

Plaintiff alleges that he paid the said note to the Bank of Vanceboro on 22 September, 1923, but that the bank failed to cancel and deliver the note to him; that he thereafter was informed that the National Bank of New Bern had possession of said note; and that said National Bank of New Bern has refused, upon his demand, to deliver the note to him. Both defendants denied that plaintiff had paid the note as alleged.

In support of his allegation that he had paid the note to the Bank of Vanceboro, prior to the appointment of the receiver, plaintiff testified that shortly before 22 September, 1923, he became the owner, by purchase, of five shares of the capital stock of the Bank of Vanceboro, standing on the books of the bank in the name of one Gaskins; that pursuant to an agreement with the cashier of said bank, he caused the certificate for said shares to be endorsed by the said Gaskins, and thereupon delivered the same to the bank; and that the bank accepted said certificate in full payment of his note. He testified that the cashier said, upon his delivery of the certificate to him, "I will give you the note in a day or two."

There was evidence tending to show that the directors of the bank authorized the cashier to accept the certificate for the shares of stock in payment of plaintiff's note. There was no evidence that plaintiff, at the time was insolvent; that the note was not collectible in money, or that it was necessary for the Bank of Vanceboro to purchase the shares of stock in order to collect the note, or to prevent loss upon a debt previously contracted.

Plaintiff excepted to the instruction of the court to answer the first and second issues, "No," and the third issue "Nothing." Assignment of error based upon this exception cannot be sustained. There was no error in the instruction.

It is provided by statute in this State that "it shall be unlawful for any bank to make any loan secured by the pledge of its own shares of stock, nor shall any bank be the holder as pledgee or purchaser, of any portion of its capital stock, unless such stock is purchased or pledged to it to prevent loss upon a debt previously contracted in good faith." 3 C. S., 220(t). Laws 1921, ch. 4, sec. 45. See, also, C. S., 224.

In the absence of evidence tending to show affirmatively that the shares of its capital stock were purchased by the Bank of Vanceboro from plaintiff to prevent loss upon the note, such purchase was in violation of the statute, and therefore void. *Phosphate Co. v. Johnson,* 188 N. C., 419. Neither party thereto acquired any rights by reason of said transaction. The delivery of the certificate for such shares was not a payment of plaintiff's note. The judgment that plaintiff recover nothing in this action is affirmed.

The evidence tended to show that plaintiff's note was transferred by endorsement of the Bank of Vanceboro to the National Bank of New Bern, prior to its maturity, as collateral security for the payment of indebtedness of the Bank of Vanceboro to the National Bank of New Bern. There was no evidence that such indebtedness had been paid, nor was there any evidence tending to show that plaintiff has any defense or equity in respect to said note available to him against the Bank of Vanceboro. The amount due upon the note was not in controversy. There was no error in the instruction of the court upon the fourth issue. The judgment that the National Bank of New Bern recover of the plaintiff the sum of $500, interest and costs is affirmed.

No error.

NATIONAL BANK OF SNOW HILL, RECEIVER, v. B. W. EDWARDS.

(Filed 5 October, 1927.)

Judgments—Demurrer—Consent of Parties—Appeal and Error—Appeal Abandoned—Jurors—Constitutional Law.

Where it appears of record that a demurrer has been entered by the defendant in a civil action and not appealed from, and the parties agree that the trial judge should find the facts and enter judgment, the judgment so entered is not erroneous by reason of the fact that a demurrer had once been interposed and abandoned.

CIVIL ACTION, before *Cranmer, J.,* at February Term, 1927, of GREENE.

Plaintiff alleged that the National Bank of Snow Hill was duly appointed receiver of the Snow Hill Banking and Trust Company on 9 July, 1925, and that the Snow Hill Banking and Trust Company closed its doors on 16 May, 1925. Plaintiff further alleged that the defendant, B. W. Edwards, was secretary and treasurer of the Greene County Farmers Mutual Fire Insurance Company, and was a member of the board of directors and of the finance committee of said insolvent bank; that some time before the failure of the bank said Edwards, as secretary and treasurer of the Fire Insurance Company, deposited the sum of $3,500 in said bank to the credit of the Fire Insurance Company, and shortly before the bank was closed and receiver appointed, demanded security for said deposit. Thereupon, the cashier of the bank delivered to said Edwards as security for said deposit a note under seal which was the property of the bank.

Under these allegations the plaintiff contends that the bank had no legal right to deliver the collateral security as aforesaid, and prays judgment against the defendant, B. W. Edwards, personally, the Fire Insurance Company not being made a party to the suit.

The defendant demurred upon the ground that there was no allegation that the Fire Insurance Company had committed any fraud or other wrong in accepting the security. The demurrer was overruled and the defendant appealed.

Thereafter, at the February Term, 1927, Cranmer, J., entered a judgment of nonsuit. The plaintiff contends that Judge Cranmer had no right to render a judgment in the cause by reason of the fact that a demurrer had been theretofore interposed, and the demurrer overruled and an appeal taken to the Supreme Court.

Upon disagreement of counsel the judge settled the case on appeal and the record discloses the following statement of what occurred at the trial: "This case was called for trial by the court . . . and the attorneys for plaintiff consented to the hearing thereof and conceded that it was unnecessary to impanel a jury and agreed that his Honor should decide the same upon the facts. Thereupon, the trial judge heard a statement of the facts in the case in open court. His Honor inquired of counsel for plaintiff, upon these facts, if he thought he was entitled to recover, and the counsel for the plaintiff conceded that these were the facts in the case and desired that his Honor should enter such judgment as he might deem proper. Thereupon, his Honor entered a consent judgment as set out in the record. Counsel for the plaintiff assented to the procedure and form of such judgment, and no exception was at that time entered or suggested thereto. On the day after this cause was heard and determined, as set out, the counsel for the plaintiff called to the attention of the court that there had theretofore been entered in this case a demurrer, which is set out in the record, which demurrer has been overruled by his Honor, Judge Cooke, and that a notice of appeal had been given from said order, but that it appeared from the record that no appeal had been perfected, and that the time and term for which said appeal would have been required to be entered had expired, and the defendant, in open court, announced that it had not perfected any appeal, and if any answer was necessary under the procedure of the court, that the same would be filed, and his Honor ruled and allowed that such answer might be filed by the defendant as he might desire, and then called the counsel for the plaintiff's attention to the fact that he had admitted the facts to be as was stated, and upon these facts he was not entitled to recover, and this being the court's opinion, he so entered the judgment."

George M. Lindsay and Rouse & Rouse for plaintiff.
J. P. Frizzelle and L. I. Moore for defendant.

PER CURIAM. The plaintiff insists that the judge had no right to render a judgment in this cause because of the fact that a demurrer to the complaint had theretofore been overruled and appeal taken to the Supreme Court and no answer filed. The record shows that the appeal to the Supreme Court from judgment overruling the demurrer had not been perfected and counsel for defendant in open court announced that the appeal would not be prosecuted. Plaintiff did not move for judgment for want of an answer, but the record discloses that the plaintiff consented to the hearing thereof and agreed that his Honor should decide the same upon the facts.

In pursuance of such agreement the trial judge rendered final judgment.

The principle of law involved is thus stated in *Peoples v. Norwood,* 94 N. C., 172: "The purpose of summons is to bring the parties into, and give the court jurisdiction of *them,* and of the pleadings, to give jurisdiction of the *subject-matter* of litigation and the parties in that connection, and this is orderly and generally necessary; but when the parties are voluntarily before the court, and by agreement, consent or confession, which in substance is the same thing, a judgment is entered in favor of one party and against another, such judgment is valid, although not granted according to the orderly course of procedure. *Stancill v. Gay,* 92 N. C., 455; *McLean v. Breece,* 113 N. C., 390. This judgment is

Affirmed.

T. G. WALL AND LIZZIE WALL v. T. M. HOWARD ET AL.

(Filed 5 October, 1927.)

Banks and Banking—Insolvency—Depositors—Actions—Individual Liability of Officers—Pleadings—Allegations—Demurrer— Statutes.

In order for the depositor in a bank since becoming insolvent and in the hands of a receiver, to maintain an action personally against the individual officers of a bank for permitting the deposits to be received, it is necessary, among other things, to allege and prove the insolvency of the bank at the time the deposits were made, and the allegation that it was either insolvent then or the misconduct of the officials afterwards caused its insolvency, is insufficient, the alternative of the allegation being a wrong to the bank itself which may be sued upon by its receiver afterwards. 3 C. S., 224(g).

CIVIL ACTION, before *Cranmer, J.,* at March Term, 1927, of PITT.

The plaintiffs on 7 April, 1923, deposited in the Bank of Vanceboro the sum of $2,200, receiving from said bank certificates of deposit for said sum. On 13 December, 1923, the Bank of Vanceboro was placed in the hands of a receiver. On 12 December, 1924, the plaintiffs instituted an action against the defendants, who are directors of said Bank of Vanceboro.

The defendants filed a demurrer, which was overruled, and the defendants appealed.

S. J. Everett for plaintiffs.
Moore & Dunn and Skinner, Cooper & Whedbee for defendants.

BROGDEN, J. The cause of action alleged by the plaintiffs is thus stated in the fifth paragraph of the complaint: "That at the time of receiving the said deposit above referred to by the said bank, the defendants in this cause knew that the said bank was insolvent or was being handled in such a reckless manner and disregardful of the trust imposed in them, the law, safe banking, and good business, that it must become insolvent as a result thereof, as is hereinafter fully set forth, making the defendants personally liable to these plaintiffs by reason of the said acts and failure to perform and do their duty as directors of the said bank."

In the succeeding paragraphs of the complaint, to wit, 6, 7 and 8, the 'reckless manner" of operating the bank by the directors is specified in detail, such as excessive loans to officers, failure to keep proper records, and otherwise disregarding the duties imposed by law upon the directors of banks.

The chief ground of demurrer is stated in the second paragraph thereof, as follows: "For that the plaintiffs have no right to maintain this action against the defendants upon the grounds alleged in the complaint, and that if any right of action exists by reason of the matters and things alleged in the complaint, then such right of action is in the receiver of the Bank of Vanceboro heretofore duly appointed."

Upon these pleadings only one question of law arises, and that is whether this case, upon the complaint as drawn, is governed by the principle announced in *Douglass v. Dawson,* 190 N. C., 458, or *Bane v. Powell,* 192 N. C., 387. When money is placed in a bank upon general deposit the relationship of debtor and creditor thereupon arises and the money passes from the depositor to the bank. *Corporation Commission v. Trust Co.,* 193 N. C., 696.

As long as a bank is solvent, as defined by law, the officers and directors are authorized to receive deposits and permit the bank to receive them. In other words, in such case deposits are rightfully received. If such deposits, so made, are thereafter misapplied, lost or wasted through the negligence of the officers and directors, and as a result thereof the bank becomes insolvent, this is a wrong done the bank, and it or its receiver alone, nothing else appearing, can maintain the action for damages, and the principle of *Douglass v. Dawson* applies. But if the bank is insolvent at the time the deposit is made, then the officers and directors commit a wrong, under the law, in permitting the deposit to be made. In other words, the taking and receiving money from the depositor, thus swelling the assets of an insolvent bank, is a wrongful act done him personally and individually, for which wrong he alone can sue. In such event, the principle of *Bane v. Powell* applies. Hence, in *S. v. Hightower,* 187 N. C., 313, *Stacy, J.,* writes: "The statute was designed to protect the depositing public against this kind of practice on the part of officers and employees of banks, and they will be held to a strict accountability under its provision when they receive or when any such officer permits an employee to receive deposits therein with knowledge of the fact that, by reason of the bank's insolvency, such deposits then being received are taken at the expense or certain peril of the depositors presently making them." The principle is further applied by *Connor, J.*, in *Bane v. Powell, supra,* as follows: "A violation of 3 C. S., 224 (g), by an employee, or by officers and directors of a bank, resulting in damages to a depositor, is a wrong to the depositor; he and not the bank or its receiver is entitled to maintain an action to recover the damages resulting from such wrong."

The distinction, therefore, between the two principles turns in the first instance upon whether or not the bank was insolvent at the time the deposit was made. The insolvency of the bank is one of the essential elements of the cause of action, and it must necessarily follow that such insolvency must be alleged in the complaint.

There is no allegation in the complaint that the bank was insolvent. There is allegation that the defendants knew it was insolvent or that it would become insolvent at some time in the future "if the reckless manner" of operating it by the officers and directors was permitted to continue for a sufficient length of time. It is, therefore, apparent that in the complaint, as drawn, an essential element of the cause of action against the defendants as directors is not alleged, and for that reason the demurrer must be sustained.

Reversed.

BANK OF VANCE, RECEIVER OF FARMERS AND MERCHANTS BANK, v. ETHEL D. CROWDER, R. B. CROWDER, HER HUSBAND, AND J. C. KITTRELL, TRUSTEE FOR THE COMMISSIONERS OF VANCE COUNTY.

(Filed 5 October, 1927.)

1. **Trusts—Implied Trusts—Fraud—Equity—Husband and Wife—Banks and Banking.**

Where the cashier of a bank has wrongfully appropriated the bank's money and buys lands, taking title to his wife, a trust is imposed upon the title in equity, by reason of the fraud, which may be followed by the bank into its converted form by suit for the purpose.

2. **Husband and Wife—Deeds and Conveyances—Gifts—Presumptions—Evidence—Instructions.**

While there is a presumption of a gift where the husband uses his money for the purchase of lands and takes title in his wife, it may be rebutted by showing that the money belonged to the separate estate of the wife, or was derived from other sources, and when the evidence is conflicting it is reversible error for the trial judge to charge the jury that there was a presumption of a gift without fully charging the law arising thereon.

APPEAL by defendants from *Grady, J.*, at June Term, 1927, of VANCE.

This was a suit in equity to establish a trust in land conveyed to Ethel D. Crowder, the *feme* defendant—the trust when declared to be subject to the deed of trust held by the defendant Kittrell as trustee. The real controversy is between the plaintiff and Mrs. Crowder. In 1912 the Farmers and Merchants Bank was organized as a banking institution under the laws of North Carolina and conducted a banking business until 16 April, 1924, when its doors were closed. Its principal place of business was in Henderson, the defendant, R. B. Crowder, serving as its cashier during the time of its business activity. On 31 October, 1922, W. P. Gholson and his wife conveyed to the *feme* defendant a lot in the town of Henderson at the agreed price of $5,500. Of this sum $3,000 was paid to R. B. Crowder by Melville Dorsey for the benefit of the grantee, who is his daughter, and was applied by Crowder in part payment of the purchase price. The remainder ($2,500) was paid in this way: James Plummer had executed his promissory note to the Farmers and Merchants Bank in the sum of $2,500, bearing interest at 6 per cent until paid, and the defendant, R. B. Crowder, then cashier, discounted the note and credited the amount to his individual account. On 10 November, 1922, he gave his personal check on the Farmers and Merchants Bank for $5,500 in full payment of the amount due for the lot. The plaintiff's most material allegations are that R. B. Crowder fraudulently discounted the Plummer note for his own benefit and fraudulently used the amount thereof in the purchase of the land, the title to which was conveyed to his wife; that she was not a bona fide purchaser for value; that the money has not been repaid, and that the bank is entitled to have a constructive trust impressed upon the property to secure return to the bank of the amount thus misappropriated by Crowder.

Separate answers were filed by Ethel D. Crowder and her husband. She alleged that she was a bona fide purchaser for value; that she had no knowledge of her husband's alleged malfeasance until some time after the whole amount of the purchase money had been paid by her father for her benefit; that the full amount of the note discounted by her husband had been returned to the bank. She alleged also that she had made valuable improvements upon the premises.

In his answer R. B. Crowder alleged that in discounting the Plummer note he had no fraudulent intent; that Mrs. Crowder had no knowledge of the discount, and that the amount had been paid back to the bank.

Issues were submitted to the jury and answered as follows:

1. Were the lands described in the complaint paid for in whole or in part by R. B. Crowder out of the moneys derived from the discounting of the James Plummer note, as alleged in the complaint? Answer: Yes.

2. If so, what amount of money belonging to said Farmers and Merchants Bank was invested in said lands by R. B. Crowder? Answer: $2,500.

3. If such moneys were invested in said lands, as alleged, has the same been repaid by the defendants or either of them? Answer: No.

4. Is the plaintiff's cause of action barred by the statute of limitations? Answer: No.

It was adjudged upon the verdict that the defendant, Ethel D. Crowder, is the holder of the legal title of a five-elevenths undivided interest in the land conveyed to her for the use and benefit of the plaintiff and that this interest be sold by commissioners. The defendants excepted and appealed upon errors assigned.

J. P. & J. H. Zollicoffer, Perry & Kittrell and Kittrell & Kittrell for plaintiff.

S. P. McDuffee and Thomas M. Pittman for defendants.

ADAMS, J. The action is prosecuted by the plaintiff for the purpose of impressing a trust, for its benefit as receiver, upon the town lot described in the deed from Gholson to Mrs. Crowder. The equitable doctrine upon which the relief is sought is not questioned. If R. B. Crowder held the proceeds of the discounted note as a trustee for the Farmers and Merchants Bank a trust resulted by operation of law for the benefit of the bank and under the doctrine of implied trusts the fund could be followed into any property into which it was converted or invested unless affected by the rights of a bona fide purchaser for value, without notice. If, on the other hand, he discounted the note with fraudulent intent he was a trustee *ex maleficio,* and against his fraud a court of equity would afford relief. "In such cases," says Bispham, "the interference of courts of equity is called into play by fraud as a distinct head of jurisdiction; and the complainant's right to relief is based upon that ground, the defendant being treated as a trustee merely for the purpose of working out the equity of the complainant." Principles of Equity, 149. In *Massey v. Alston,* 173 N. C., 215, it is said: "A court of equity is not bound to wrest the property from the wrongdoer by a rescission, but may mould its decree to the particular and controlling equity of the case and the real and substantial rights of the parties. . . . Equity makes use of the machinery of a trust for the purpose of affording redress in cases of fraud, and will follow the property obtained by a fraud in order to remedy the wrong, and only stops the pursuit when the means of ascertainment fails or the rights of bona fide purchasers for value, without notice of the fraud or trust, have intervened." *Campbell v. Drake,* 39 N. C., 94; *Edwards v. Culberson,* 111 N. C., 342; *Mfg. Co. v. Summers,* 143 N. C., 102; *Bank v. Waggoner,* 185 N. C., 297.

While not contesting this equitable doctrine, the defendants say that Mrs. Crowder was an innocent purchaser of the property for value, without notice of any fraud or trust. It was some time after she had endorsed and delivered to her husband the check for $2,500 that she first heard of his alleged malfeasance. Indeed, his Honor plainly told the jury that there was neither allegation nor contention that she knew her husband had misappropriated the bank's money by investing it in her land. He gave the additional instruction that in no view of the law could Mrs. Crowder be an innocent purchaser for value "so far as the $2,500 is concerned"; that according to her admission her husband had paid $2,500 as a part of the price of the land, and that in contemplation of law the payment was a gift. Their relation raised the presumption of a gift *pro tanto* when he purchased the land and had the title conveyed to his wife; but this is a presumption of fact which is not conclusive, but rebuttable. *Arrington v. Arrington,* 114 N. C., 116; *Sherrod v. Dixon,* 120 N. C., 60; *Evans v. Cullens,* 122 N. C., 55; *Singleton v. Cherry,* 168 N. C., 402; *Nelson v. Nelson,* 176 N. C., 191; *Anderson v. Anderson,* 177 N. C., 401; *Tire Co. v. Lester,* 190 N. C., 411, 416.

The instruction complained of was evidently given upon the principle that there was no evidence to rebut the presumption that the money was a gift. Though the testimony upon which the defendants rely as tending to repel the presumption of a gift was not full or comprehensive, we cannot hold as a matter of law that it should not have been submitted to the jury. Mrs. Crowder testified: "I have seen this check for $2,500 before; it was given to me to pay on the Southerland Stables, by my father, Melville Dorsey. I endorsed the check and gave it to Mr. R. B. Crowder to pay $2,500 on the Southerland Stables. At the time the lot was bought in November, 1922, my father paid $3,000 on the purchase price, and this was to pay the balance of $2,500 to complete the $5,500 purchase price. I was to return to R. B. Crowder the $2,500 that he had paid on the property at the time it was purchased."

And her father said: "The reason I did not furnish the entire $5,500 at that time instead of only $3,000 was because I could not do it . . . I paid for it in the final. . . . The reason I did not pay for it earlier was because I had a very sick daughter in the hospital, and was under a great deal of expense, and had my taxes to pay for two years, and it was using all of the ready money I had, and as soon as I found out that I had money ahead, I paid it. The reason I was paying this was for it to be my daughter's separate estate."

In our opinion this testimony, together with other circumstances, is some evidence that it was understood between the parties that the money advanced by R. B. Crowder should be treated as a loan and not as a gift. For this reason there must be a

New trial.

LEGGETT ELECTRIC COMPANY v. E. H. MORRISON.

(Filed 5 October, 1927.)

1. **Principal and Agent—Contracts, Written — Lands — Deceit—Fraud—Actions.**

   For an electric power transmission company to obtain a valid right with the agent of the owner, to enter upon the lands of the owner and erect its poles, etc., for the transmission of its current, it is required that the authority of the agent, to bind his principal, must be in writing, and where the power company, with the knowledge of the facts, expressed or implied, has erected its poles, etc., without the written authority of agency conferred, and the wife, the owner of the lands, repudiates the acts of the husband, acting as her agent, and causes the power company to remove them from her lands, a civil action for damages founded on deceit against the husband will not lie.

2. **Fraud and Deceit—Damages—Evidence.**

   In order to recover damages for fraud or deceit, it is necessary to show the representations, its falsity, scienter, deception and injury, in which representation must be definite, specific, materially false, knowingly made with fraudulent intent, or in culpable ignorance of the truth, reasonably relied on by the promisee, and caused the loss in suit.

CONNOR, J., did not sit.

APPEAL by plaintiff from *Nunn, J.*, at April Term, 1927, of EDGECOMBE.

George M. Fountain for plaintiff.
Gilliam & Bond and H. H. Phillips for defendant.

ADAMS, J. The plaintiff, a corporation authorized by the laws of North Carolina to transmit electric power, entered into negotiations with the defendant and his wife for the purpose of acquiring a right of way over the land which was owned by Mrs. Morrison. After repeated conferences between the parties the plaintiff failed to procure the grant, but, as alleged in the complaint, the defendant subsequently told the plaintiff's agent that he and his wife had "agreed to extend the right of way upon the condition that same be not had on the road, but back from the road," and pointed out the place where the poles should be erected. It was alleged that on other occasions before any work had been done on the land the defendant held himself out as the agent of his wife and said that it would not be necessary for the agent to see her because she had approved and assented to "the extension of the right of way"; and, further, that the plaintiff, relying upon these representations, erected its poles on the land and was afterwards compelled by Mrs. Morrison to remove them in consequence of which it had suffered financial loss.

The action was laid in deceit and was prosecuted on the theory that the defendant was not his wife's agent. The plaintiff evidently knew that Mrs. Morrison owned the land and was affected with constructive notice that any parol license which the defendant gave the plaintiff to enter thereon was revocable at the will of the owner, and that any purported or intended grant of an easement or other conveyance of a permanent or continuing right in the land must have been evidenced by a written instrument duly executed and proved or acknowledged. *McCracken v. McCracken,* 88 N. C., 273; *Kivett v. McKeithan,* 90 N. C., 106; *R. R. v. R. R.,* 104 N. C., 658; *Herndon v. R. R.,* 161 N. C., 650; *Davis v. Robinson,* 189 N. C., 589, 600. The alleged permission was not evidenced by any writing and the plaintiff incurred the hazard of Mrs. Morrison's objection to the entry upon her land. Her objection was made known to the plaintiff and the poles were removed.

The essential elements of actionable fraud or deceit are the representation, its falsity, scienter, deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss. If it be granted that the allegations in the complaint state a cause of action the testimony offered by the plaintiff, in our opinion, is not sufficient to establish all the elements of actionable deceit. The judgment is

Affirmed.

CONNOR, J., did not sit.

STATE v. LESLIE ROUSE.

(Filed 5 October, 1927.)

Criminal Law—Verdict—Eleven Jurors—Consent — Judgment — Appeal and Error—Reversal—Constitutional Law.

While it may appear upon the face of the record in a criminal action on appeal to the Supreme Court that the defendant had agreed that the verdict of eleven jurors, one being excused for sickness, should be received as valid, the defendant may nevertheless insist that the verdict is invalid, and it appearing that it was not rendered by a verdict of twelve men it will be declared invalid and a new trial ordered.

APPEAL by defendant from *Sinclair, J.*, at May Term, 1927, of LENOIR. New trial.

Indictment for a felony. From judgment upon a verdict of guilty, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

P. D. Croom for defendant.

CONNOR, J. The record in this case contains an entry as follows: "While taking evidence, one of the jurors is taken very ill. By agreement of counsel for defendant, in the presence of defendant, and of the Solicitor for the State, the juror is excused. The case is concluded with eleven jurors."

The contention made in the brief for defendant filed in this Court that "the record does not disclose that the defendant agreed to anything other than to excuse the juror," is not supported by a fair interpretation of the record. It is manifest that defendant, upon advice of counsel, then appearing for him, agreed that the trial should proceed with eleven jurors, and that their verdict should be taken as the verdict of the jury. Otherwise, the learned judge, who presided at the trial, would have found the facts, ordered the juror withdrawn, and that a new trial be had.

The agreement, however, although entered upon the record in this case in the presence of and with the consent of defendant, upon the advice of counsel then appearing for him, does not, upon well settled principles, preclude defendant from assigning as error, upon his appeal to this Court, a judgment rendered upon the verdict of eleven jurors. The decisions of this Court in support of the assignment of error are unanimous. *S. v. Berry*, 190 N. C., 363; *S. v. Hartsfield*, 188 N. C.,

357; *S. v. Wheeler,* 185 N. C., 670; *S. v. Pulliam,* 184 N. C., 681; *S. v. Rogers,* 162 N. C., 656; *S. v. Scruggs,* 115 N. C., 805; *S. v. Holt,* 90 N. C., 749; *S. v. Stewart,* 89 N. C., 564.

The judgment having been rendered upon a verdict of eleven jurors, as shown by the record, cannot be sustained. The verdict is a nullity. The defendant is entitled to a

New trial.

STATE v. C. E. EUBANKS.

(Filed 5 October, 1927.)

Criminal Law—Embezzlement—Evidence—Nonsuit.

Where there is evidence that an agent is charged with the duty of selling a load of tobacco upon a local market on behalf of the principal only, and accordingly receiving the price, he intentionally and wrongfully converted it to his own use, it is sufficient to constitute the crime of embezzlement, C. S., 4268, and sustain a verdict of guilty, on a motion as of nonsuit. C. S., 4643.

APPEAL by defendant from *Sinclair, J.,* at May Term, 1927, of LENOIR.

Criminal prosecution tried upon an indictment charging the defendant (a person over the age of sixteen years) with embezzlement. C. S., 4268.

From an adverse verdict and judgment thereon, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Shaw & Jones for defendant.

STACY, C. J. There is evidence on behalf of the State, from which the jury could and did find: (1) That on 4 October, 1926, the defendant, C. E. Eubanks, was the agent of the prosecutor, John Smith, and charged with the duty of selling, on the Greenville market, a load of tobacco and receiving the price therefor, the property of his principal; (2) that he did in fact receive such money amounting to $110; (3) that he received it in the course of his employment; and (4) that he intentionally and wrongfully converted it to his own use, knowing that it was not his own.

This evidence was sufficient to constitute the crime of embezzlement, hence the case was properly submitted to the jury. *S. v. Gulledge,* 173 N. C., 746; *S. v. Long,* 143 N. C., 674; *S. v. Connor,* 142 N. C., 708; *S. v. Summers,* 141 N. C., 843; *S. v. Blackley,* 138 N. C., 620.

The motion for judgment as of nonsuit, made under C. S., 4643, was properly overruled.

No error.

W. H. FRANCISCO v. PINE CLIFFE CAMP AND COUNTRY CLUB AND W. B. WADSWORTH v. PINE CLIFFE CAMP AND COUNTRY CLUB.

(Filed 5 October, 1927.)

Judgments—Liens—Mechanics' Liens—Appeal and Error—Statutes.

Where a laborer on a building being constructed has failed in his action to establish a lien on the building, and judgment is entered creating only a judgment lien from which he has not appealed, the lien of the judgment takes effect from the time of its rendition, and does not relate back to the time of the filing of the lien in the clerk's office under the provisions of our statute relating to mechanics' liens so as to give it priority out of the proceeds of the sale of the property to the liens of other judgments theretofore entered.

APPEALS by W. H. Francisco from *Cranmer, J.,* at June Term, 1927, of CRAVEN.

Controversy among judgment creditors relative to the proper distribution of proceeds arising from sale of defendant's land under execution. The question presented is the right to priority of satisfaction out of said funds.

From the order entered W. H. Francisco appeals, assigning error.

Guion & Guion and D. H. Willis for plaintiffs.
Whitehurst & Barden for appellees.

STACY, C. J. These appeals present but a single question. It is this: When notice of claim is filed in the clerk's office by a laborer, mechanic or material-furnisher, and judgment subsequently rendered in an action by such laborer, mechanic or material-furnisher against the owner of the building for the amount of his claim, but in which the plaintiff's right to a statutory lien as a laborer, mechanic, or material-furnisher, is specifically denied, does the lien of said judgment take effect from the date of its entry, or would such lien relate back to the date upon which the laborer, mechanic, or material-furnisher filed notice of his claim in the clerk's office?

The question answers itself. His Honor correctly held that as W. H. Francisco failed to obtain a judgment on his claim of lien as a laborer, mechanic, or material-furnisher, and did not appeal from the order awarding him judgment as a general creditor only, the lien of the judgment entered in his favor took effect from the date of its entry, 31 January, 1927, and not from the date of the filing of claim in the clerk's office, 30 July, 1926, which he failed to prosecute to a successful conclusion, and that said judment was not entitled to share in the distribution of the proceeds, derived from the sale of defendant's land under execution, over other judgments, docketed prior to 31 January, 1927.

Affirmed.

A. D. WARD ET AL. v. DORA AGRILLO.

(Filed 5 October, 1927.)

1. **Judgments—Clerks of Court—Pleadings—Default and Inquiry—Appeal and Error—Resident Judge—Jurisdiction—Statutes.**

   The power of the resident judge to hear appeals from the Superior Court clerk of the county of his residence must rest alone by statute, and he is without statutory authority to entertain such appeals involving the question as to whether the plaintiff in an action to recover for services rendered the defendant is entitled to a judgment by default and inquiry for the want of an answer. 3 C. S., 593; Const. of N. C., Art. IV, sec. 11.

2. **Clerks of Court—Pleadings—Judgments—Default and Inquiry—Jurisdiction.**

   The clerks of the Superior Court have jurisdiction to hear and determine motions for judgment by default, etc., for the want of answer to the complaint filed in an action properly brought in their respective counties.

APPEAL by defendant from judgment of *Nunn, J.*, resident judge of Fifth Judicial District, at Chambers. Appeal dismissed.

Guion & Guion, D. L. Ward and Whitehurst & Bardin for plaintiffs.
Shaw & Jones for defendant.

CONNOR, J., Plaintiffs in this action demand judgment that they recover of defendant for professional services rendered, and expenses incurred by them, as attorneys and counsellors at law, in defendant's behalf and at her request.

The summons, dated 31 March, 1927, and returnable in the Superior Court of Craven County on 15 April, 1927, was personally served on 1 April, 1927. On the return day plaintiffs filed their duly verified complaint. No answer has been filed thereto by defendant. She filed a motion before the clerk of the Superior Court for the removal of the action to the District Court of the United States for trial. The motion was denied by the clerk on 5 May, 1927. Defendant's appeal from the order of the clerk, denying her motion for removal, was heard by the judge presiding at the May Term, 1927, of the Superior Court of Craven County. The order of the clerk was affirmed. There was no appeal from the judgment affirming the order of the clerk and denying defendant's motion for removal. The record does not show that defendant has taken further action to have the cause removed to the District Court of the United States for trial. It is still pending in the State Court.

After defendant's motion for removal had been denied, plaintiffs moved before the clerk of the Superior Court for judgment by default and inquiry. 3 C. S., 593. From the refusal of the clerk to enter judgment upon this motion, plaintiffs appealed to the resident judge of the Superior Court. Upon the hearing of this appeal by the said judge on 2 July, 1927, at New Bern, N. C., both plaintiffs and defendant appeared by their respective attorneys. After argument judgment was rendered by said judge, remanding the action to the clerk, with directions "to enter judgment for the plaintiffs in the form tendered, or in some other form of equivalent effect." To this judgment defendant excepted.

Thereafter, on 25 July, 1927, the clerk of the Superior Court rendered judgment for plaintiffs and against defendant, by default and inquiry, directing therein that an issue be submitted to a jury to be empaneled at the next or at a subsequent term of the Superior Court of Craven County, for the assessment of damages, etc. To this judgment defendant excepted. She has appealed therefrom to the judge of the Superior Court. It does not appear that this appeal has been heard or disposed of. It is still pending.

This action is here upon the appeal of defendant from the judgment of the resident judge, remanding the action to the clerk, with directions. Only the validity of this judgment is, therefore, presented by this appeal. Defendant's contention that the judgment is void, for that the resident judge was without jurisdiction to hear and determine the appeal from the clerk, is well founded.

In *S. v. Ray,* 97 N. C., 510, it is held by this Court that each judge of the Superior Court has general jurisdiction only in the judicial district to which he is assigned by statute enacted pursuant to the provisions of section 11 of Article IV, of the Constitution of North Carolina, except in case of the exchange of courts with another judge, or of special commission to hold a special term of court in a particular county. It is there said that "this seems to have been understood as the law ever since the present system of judicature was established." See *Moore v. Moore,* 131 N. C., 371, where it is held that a resident judge holding court in another district cannot hear a motion to reduce alimony *pendente lite* in a suit pending in the district in which he resides. The judge assigned by statute to a district is the judge thereof for six months, beginning on 1 January or July, as the case may be. *Hamilton v. Icard,* 112 N. C., 589. The resident judge has no jurisdiction, except such as has been or may be expressly conferred by statute.

In the absence of statutory provision to that effect, the resident judge of a judicial district has no jurisdiction to hear and determine an appeal from a judgment of the clerk of the Superior Court of any county in his district, rendered pursuant to the provisions of 3 C. S., 593, except when such judge is holding the courts of the district by assignment under the statute, or is holding a term of court by exchange, or under a special commission from the Governor. No jurisdiction is conferred upon the resident judge by the requirement of the Constitution that every judge of the Superior Court shall reside in the district for which he is elected. The General Assembly has power, however, to confer jurisdiction upon such judge by statute, as it has done in the case of a final order or judgment, affecting the merits of the case, rendered in a special proceeding, *ex parte,* where an infant or the guardian of an infant is a petitioner, C. S., 761; and also with respect to the hearing of restraining orders and injunctions. C. S., 852. There is no provision in the recent statutes enacted by the General Assembly to expedite and reduce the cost of litigation, providing that a resident judge may hear and determine appeals from judgments rendered by the clerks of the Superior Courts of the several counties as authorized by 3 C. S., 593.

The judgment appearing in the record rendered by the resident judge of the Fifth Judicial District, upon plaintiff's appeal from the refusal of the clerk to render judgment upon plaintiff's motion for judgment by default and inquiry, is void; it has no effect or validity. The judge was without jurisdiction to hear and determine the appeal.

However, the clerk has since rendered judgment upon plaintiff's motion, and defendant's appeal from this judgment to the judge of the Superior Court is now pending. Nothing appears in this record by which her right to be heard upon this appeal has been prejudiced. The judge holding the courts of Craven County may hear and determine this appeal, without regard to the judgment of the resident judge, which has no force or effect, for the reason that he was without jurisdiction to render the judgment.

It does not appear from the record upon what grounds the clerk first refused to render judgment upon plaintiff's motion—whether he was of opinion that he was without power to do so, or whether upon consideration of the motion he was of opinion that plaintiffs were not entitled to the judgment, upon their complaint. As he has subsequently heard the motion and rendered judgment, we conclude that he was of opinion, when the motion was first made, that he was without power. The statute expressly confers upon him the power to consider the motion and render judgment in accordance therewith, if he was of opinion that plaintiffs, upon their complaint, were entitled to judgment by default and inquiry. This appeal must be

Dismissed.

ANNIE MIZELL ET AL., CHILDREN OF JOHN MIZELL, INFANTS, APPEARING BY THEIR NEXT FRIEND, M. H. MORRIS, AND JOHN MIZELL AND HIS WIFE, MARIE MIZELL, ALL BEING DEVISEES UNDER THE WILL OF WESTON MIZELL, v. R. C. BAZEMORE AND J. W. COOPER, SHERIFF OF BERTIE COUNTY.

(Filed 5 October, 1927.)

1. **Equity—Judgments—Sales—Execution—Cloud on Title — Statutes—Actions—Suits.**

   Under the provisions of C. S., 1743, the sheriff's sale of land by execution under a judgment may now be restrained by suit in equity when it will cast an additional cloud upon the title of the owner of the lands.

2. **Same—Estates—Debtor and Creditor—Void Limitations.**

   Where a life estate is devised to the testator's son and changed by codicil to appoint a trustee to hold the title and to give him the full rights of enjoyment of a life tenant in the event a creditor should bring action against him for a debt: *Held,* the condition upon which the title is to be held in trust is void and his title as tenant for life will continue for the duration of his life, and a sale by execution under a judgment against him will not be enjoined as a further cloud upon his title. C. S., 677.

APPEAL by plaintiffs from judgment of *Grady, J.,* at February Term, 1927, of BERTIE. Affirmed.

Action to restrain and enjoin defendant, sheriff of Bertie County, from selling lands situate in said county and devised to plaintiffs in the last will of Weston Mizell, deceased, under executions in his hands, issued upon judgments duly docketed in said county in favor of defendant, R. C. Bazemore, and against plaintiff, John Mizell, upon allegation that said judgment debtor has no interest in said lands, subject to the lien of said docketed judgments and to sale under execution, and for other relief.

From judgment dissolving a temporary restraining order, and dismissing the action, plaintiffs appealed to the Supreme Court.

Craig & Pritchett for plaintiffs.
Winston, Matthews & Kenney for defendants.

CONNOR, J. In *Harris v. Distributing Co.,* 172 N. C., 14, it is said: "It has been held in this State that an action cannot be maintained to restrain the sale of land under execution upon the ground that the sale and deed made pursuant thereto will be a cloud on the title of the plaintiff *(McLean v. Shaw,* 125 N. C., 491), but this has been changed by statute *(Crockett v. Bray,* 151 N. C., 615), and a plaintiff can, under the law as it now exists, restrain a sale under execution if the deed of the officer who sells will not pass title, and will only throw a cloud upon the title of the plaintiff." C. S., 1743.

The question as to whether John Mizell, the judgment debtor, has an interest in the land described in the complaint, which is subject to the lien of the docketed judgments, and to sale under executions issued upon said judgments, and now in the hands of the sheriff, is presented for decision by the plaintiffs, the children of John Mizell, who allege that they are now the owners of said land. Plaintiffs, other than the judgment debtor, may maintain this action to have the judgments declared a cloud upon their title to said land and to restrain the sale and conveyance of the land by the sheriff, upon their allegation that such sale and conveyance will constitute a further cloud upon their title. The judgment debtor, upon the allegations of the complaint, has no title to the land upon which a cloud can be cast. He joins his co-plaintiffs in the contention that he has no right, title, interest or estate in and to the land. They contend that he has been divested of all such right, title, interest or estate, as he took under the will of Weston Mizell, in accordance with its express terms. Defendants contend that John Mizell has a life estate in said land, and that same is subject to sale under execution now in the hands of the sheriff. It is admitted that the children of John Mizell own the land subject to such life estate.

The last will of Weston Mizell, deceased, has been duly probated. It is dated 30 October, 1918, and contains the following item:

"Third. Subject to the two foregoing paragraphs of this will, I loan to my son, John Mizell, for and during his natural life, my Hope Tract of land; and at his death, if she is then living, I loan the said tract of land to Marie Mizell, wife of my said son, so long as she remains his widow, and after the remarriage or death of said Marie Mizell, I give and devise the said tract of land in fee simple to the children of my said son, John Mizell." The two preceding paragraphs are not relevant to the question here to be decided.

On 27 September, 1919, Weston Mizell executed a codicil to his said will, the pertinent provisions of which are as follows:

"First. I hereby revoke and cancel the third section and item of my said will and in lieu thereof make the following devise:

'I give and devise my Hope Tract of land, subject to items one and two of my said will, to my son, John Mizell, for and during his natural life, and at his death to his children in fee simple; and in case of the death of any child of my said son, during his lifetime, leaving issue, the issue of such child, or children shall represent his, her or their parent or parents and take the share which said child or children would have taken had he, she or they been alive at the death of my said son, John Mizell.'"

On 8 January, 1921, the said Weston Mizell executed another codicil to his will, in words as follows:

"First. Section 3 of said will and testament as changed by codicil heretofore made on 27 September, 1919, will stand, except that the said life estate to said John Mizell be on the following contingency:

'If the said John Mizell shall become involved, and if any creditor or creditors of the said John Mizell shall seek to subject the said lands to the payment of his debts, either by way of execution or otherwise, or if the said John Mizell shall attempt to convey the same by way of mortgage to secure debts, then said estate of said John Mizell shall instantly cease, and shall vest in his children in fee simple, this to include children already born or which may thereafter become born to him in legitimate wedlock.

And further that in case the said estate should so vest in said children by reason of such subjection to debts or transfer as security, then said John Mizell shall have the full use and privilege of using said land and houses, etc., on said lands during his natural life without accounting to or paying to anybody the rent for any use and occupation of same.

'And further, the estate to his children shall not lapse as to any child born at time of this will and codicil taking effect, but, if necessary, the courts and law will appoint a trustee to preserve and protect said title of such unborn children, who shall share equally with the children already born to said John Mizell.' "

Plaintiffs, conceding that John Mizell, under the will of Weston Mizell, took a life estate in the lands upon which the sheriff has levied, and which he will sell under the executions now in his hands, unless restrained from so doing, contend that said life estate ceased upon the happening of the contingency as provided in the codicil dated 8 January, 1921, for that a creditor of John Mizell is now seeking to subject said lands to the payment of his debts by way of execution. But for the provision in the codicil, dated 8 January, 1921, this contention would be well founded. In *Wool v. Fleetwood,* 136 N. C., 461, *Walker, J.,* says: "A distinction is sometimes to be found in the cases between a condition against alienation or anticipation, coupled with a provision that the life tenant and his assigns shall lose the estate if the condition is broken, and that it shall go over (which makes it a limitation), and one by which he is compelled to keep the property so that neither his grantees nor any third person can get hold of or enjoy it, the latter condition being declared as void, and the former as valid. We need not pass upon this distinction as there is no limitation over in this case." See *Mebane v. Mebane,* 39 N. C., 131.

In the instant case there is a limitation over to the children of John Mizell, upon the happening of the contingency, upon which his life estate in the land shall cease. However, it is provided in the codicil that although the life estate of John Mizell shall cease, upon the happening of the contingency, he shall thereafter, nevertheless, have full use, and privilege of using the land, together with all buildings thereon, without accounting to his children or to any one else for rent. The manifest purpose of this last provision is that the life estate of John Mizell in the land, upon the happening of the contingency, shall cease, only insofar as the rights of creditors are concerned. This is at least the effect of the provision, for if the same is valid, notwithstanding the happening of the contingency upon which his life estate shall cease, John Mizell shall remain in possession of the land, with all the rights and powers with respect thereto, during his natural life, which are incidents of a life estate. This provision must be held void and of no effect, upon the principle stated by *Ruffin, C. J.,* in *Mebane v. Mebane,* 39 N. C., 131. After reviewing a number of cases, in which this question was presented, he says: "The foregoing cases sufficiently establish, that by the use of no terms or art can property be given to a man, or to another for him, so that he may continue to enjoy it, or derive any benefit from it, as the interest, or his maintenance thereout or the like, and at the same time defy his creditors and deny them satisfaction thereout. The thing is impossible. As long as the property is his, it must, as an incident, be subject to his debts, provided only that it be tangible."

We concur in the opinion that the codicil dated 8 January, 1921, is void and of no effect. This opinion is supported by many authoritative decisions of this Court. *Bank v. Heath,* 187 N. C., 54; *Vaughn v. Wise,* 152 N. C., 31; *Ricks v. Pope,* 129 N. C., 52; *Pace v. Pace,* 73 N. C., 125; *Mebane v. Mebane,* 39 N. C., 131; *Bank v. Forney,* 37 N. C., 184; *Dick v. Pitchford,* 21 N. C., 480. Indeed, it would be absurd, as *Ruffin, C. J.,* says, if the law were otherwise.

We find no error. The life estate of John Mizell in the land levied upon by the sheriff, whether the same be legal or equitable, is subject to sale under executions issued upon the judgments recovered by defendant, R. C. Bazemore, against the said John Mizell. C. S., 677. The temporary restraining order was properly dissolved, and the judgment dismissing the action is

Affirmed.

WISE SUPPLY COMPANY v. JOHN R. DAVIS AND WARREN DEVELOPMENT COMPANY, INTERVENER.

(Filed 5 October, 1927.)

Landlord and Tenant—Contracts — Options — Advancements — Liens— Statutes.

A contract expressed and purporting to be a lease of lands for agricultural purposes, does not change the relationship of landlord and tenant between the parties upon the ground that if the amount of stipulated rent should be paid at a certain time it should be regarded as a credit upon the purchase of the land at a stated price, it not appearing that the transaction of the contemplated purchase had been made under option given; and the landlord or one to whom the contract has been validly assigned may enforce statutory lien, C. S., 2355, in priority to the lien of one furnishing advancements for the cultivation of the crop. C. S., 2480.

APPEAL by plaintiff from *Grady, J.,* at January Term, 1927, of WARREN. Affirmed.

Action to recover possession of certain crops made by defendant, John R. Davis, during the year 1926, upon lands situate in Warren County.

Plaintiff contends that it is entitled to said crops by virtue of a lien for advancements made by it to defendant, pursuant to an agreement in writing, duly registered, as required by statute. C. S., 2480.

Intervener contends that it is entitled to said crops by virtue of a landlord's lien arising out of a rental contract between the owner of the land and defendant, John R. Davis. C. S., 2355. It is the holder by assignment of a note executed by Davis and payable to the owner of the land for rent.

No answer was filed by defendant, John R. Davis. The controversy presented for decision arises solely out of the conflicting claims of plaintiff and intervener.

By agreement, trial by jury was waived. From judgment upon the facts as found by the judge, plaintiff appealed to the Supreme Court.

J. H. Bridgers and Williams & Banzet for plaintiff.
F. H. Gibbs and Polk & Polk for intervener.

CONNOR, J. The controversy between the plaintiff and the intervener involves, primarily, the construction of the contract between L. J. King, the owner of the land upon which the crops were grown, and the defendant, John R. Davis. If their relationship with respect to the said land, as established by the contract, was that of vendor and vendee, then the intervener, claiming under the owner of the land, has no lien upon the crops, and is not entitled to their possession. On the other hand, if Davis cultivated the land, under the contract, as a tenant of L. J. King, owner of the land, the intervener, as assignee of the rent note executed by the tenant and payable to the landlord, has a lien upon the crops, superior to that of plaintiff for advancements. C. S., 2355.

On 10 February, 1926, John R. Davis executed his note for $500, payable on or before 15 November, 1926, to the order of L. J. King. This note contains a recital as follows: "This is for rent for the year 1926 of a part of the old Hawks Place of about thirty (30) acres (it being for that part of said place on which his former residence is located), situated in Warren County, Hawtree Township." The note was transferred and assigned by L. J. King to the intervener. On 23 November, 1926, John R. Davis paid to the intervener, to be credited on said note, the sum of $263.80. No other payment has been made on the note. The crops in controversy were grown during the year 1926 by John R. Davis upon the land described in the note.

Contemporaneously with the execution of the said note, L. J. King entered into an agreement with John R. Davis, which was in writing and is as follows:

"Warrenton, N. C., 10 February, 1926.

"Having this day rented John R. Davis about thirty acres of my land, known as the old Hawks Place, situated in Warren County, Hawtree Township, N. C. (it being for that part of said place on which the residence is located), I hereby agree to sell him said place at the price of eighty dollars ($80) per acre, on or before 15 November, 1926, provided he pays me the full sum of $500 for rent of said place for the year 1926.

"Time is the essence of this agreement. Should the $500 be paid as outlined above, I will sell him said place at $80 per acre, deducting the $500 from this price, he giving me deed of trust and notes for the full amount of the balance of the purchase price of said land. All notes to bear 6 per cent interest, and payable annually, one note for one-fourth, pay 15 November, 1927, 1928, 1929 and 1930.

"L. J. KING.

"Witness: B. L. NEWELL."

Plaintiff's contention that by virtue of this contract the relation of vendor and vendee was established between L. J. King and John R. Davis cannot be sustained. By the terms of the contract, John R. Davis had an option to purchase the land, provided he paid to L. J. King, his lessor, on or before 15 November, 1926, the sum of $500. It does not appear that he paid the said sum, or undertook to exercise his option, certainly at any time prior to the date of the lien given by him to plaintiff for advancements, or at any time prior to the making of said advancements by plaintiff. At the time the advancements were made, no change in the relationship established by the contract, had been made.

In *Burwell v. Warehouse Company,* 172 N. C., 79, construing a contract similar in all essential features to that involved in this action, this Court held that the relationship between the parties thereto was that of landlord and tenant, and not that of vendor and vendee. It is there said: "The agreement in this case does not create the relation of vendor and vendee, as contract of sale does not appear upon the face of the paper to have been perfected. The effect of the instrument appears upon its face to give to Arrington an option on the place and a definite time within which to exercise his right. It is expressly provided that time shall be of the essence of the contract. Under such conditions, we see no reason why it was not competent for the parties to occupy the relation of landlord and tenant towards each other pending such period."

It was there held that the owner of the land, by virtue of his statutory lien as landlord, was entitled to recover possession of the crops.

Burwell v. Warehouse Company is cited with approval in *Jerome v. Setzer,* 175 N. C., 391, and is authoritative upon the question presented by this appeal.

The only interest which John R. Davis had in the land upon which the crops involved in this action were grown, at the time plaintiff agreed to make advancements to him, or at the time the advancements were made, was as tenant or lessee of the owner of the land. Plaintiff's lien for advancements is subject to the lien of the landlord for rent by the express provisions of the statute. C. S., 2480. There was no error in the judgment that the intervener, as assignee of the landlord, recover possession of the crops for the purpose of enforcing its lien.

The rent to be paid by the tenant to the landlord was fixed by contract between the parties prior to the making of advancements to the tenant by plaintiff. It is immaterial whether such rent was reasonable or not. Plaintiff made the advancements after the rental contract had been made. Its lien for advancements is subject to all the terms of the rental contract, which it could have ascertained before making the advancements. The contract between the landlord and his tenant, as to the amount to be paid as rent cannot be altered, certainly in the absence of allegations and proof of fraud, in accordance with the contentions of plaintiff.

It should be noted that no controversy between the parties to the rental contract is involved in this action. Both the plaintiff and the intervener rely upon statutory liens in support of their claims to the crops made by defendant Davis upon land which he rented from L. J. King. We find no error. The judgment is

Affirmed.

BANK OF VANCE, RECEIVER OF FARMERS AND MERCHANTS BANK, v. ETHEL D. CROWDER AND R. B. CROWDER.

(Filed 5 October, 1927.)

1. **Husband and Wife—Deeds and Conveyances—Gifts—Presumptions—Instructions.**

Where the cashier of a bank misappropriated its funds and used it as a part payment for lands to which he takes title in his wife, and there is no evidence tending to show that the wife repaid her husband or that it was repaid to the bank, it raises a presumption of a gift by the husband to his wife, which equity will set aside at the suit of the bank, and an instruction that the law presumed the gift is, upon the evidence, not erroneous.

2. **Witnesses—Bookkeeping—Experts—Banks and Banking—Meaning of Entries of Books of Bank—Embezzlement.**

An expert witness properly qualified may testify to entries made by its cashier upon the books of a bank, and their meaning tending to show his defalcation, when material to the inquiry. (See, also, *Bank v. Crowder*, *ante*, 312.)

APPEAL by defendants from *Grady, J.,* at June Term, 1927, of VANCE.

The verdict was as follows:

1. Were the lands described in the complaint paid for, in whole or in part, by the money belonging to the Farmers and Merchants Bank, as alleged in the complaint? Answer: Yes.

2. If so, what amount of money belonging to said bank was invested in said lands? Answer: $600.

3. Is the plaintiff's cause of action barred by the statute of limitations? Answer: No.

Kittrell & Kittrell, Perry & Kittrell and J. P. & J. H. Zollicoffer for plaintiff.

D. P. McDuffee and Thomas M. Pittman for defendants.

ADAMS, J. It was alleged by the plaintiff, and all the evidence tended to show, that R. B. Crowder, cashier of the Farmers and Merchants Bank, while heavily indebted to the bank, discounted a promissory note for $600, which was then its property, without consideration therefor, and deposited the amount of the note to his personal credit; that with this money he purchased from J. A. Pilley and his wife a lot containing three acres and a half; and that he had the title thereto conveyed to his wife, Ethel D. Crowder. In her answer Mrs. Crowder admits the purchase was not made with her money, and there is no evidence that she has repaid her husband or the bank. The defendants neither testified nor introduced any witness; and there was no evidence tending to rebut the presumption of a gift from the husband to the wife.

The jury were instructed to answer the issues as they appear of record if they found the facts to be as testified to by all the witnesses. In this instruction we find no error. Admission of the testimony of the expert witness as to the entries found in the books kept by the cashier and their meaning was not improper. *S. v. Hightower,* 187 N. C., 307; *Loan Asso. v. Davis,* 192 N. C., 108. We have given attention to the other exceptions to the admission of evidence and to the judge's charge and find in them no sufficient grounds for a new trial. The equitable doctrine upon which the relief afforded by the judgment is founded is set forth in *Bank v. Ethel D. Crowder et al., ante,* 312, and need not be repeated here. The record presents no adequate reason for disturbing the judgment.

No error.

J. FRANK SMITH, OTHO SMITH, A. B. PARKS, A. W. PARKS, E. P. DANIEL, FENNELL HINSON, CECIL PARKS, ROWLAND PARKS, HENRY HART, J. B. SMITH, CHARLIE PARKS, B. E. PARKS, ON BEHALF OF THEMSELVES AND ALL OTHER INTERESTED CITIZENS AND TAXPAYERS WHO MAY COME IN AND MAKE THEMSELVES PARTIES HEREIN, v. STATE HIGHWAY COMMISSION.

(Filed 5 October, 1927.)

Roads and Highways—Highways—State Highway Commission—Statutes—Location of Roads—County Commissioners—Final Adjudication—Injunction.

Where the road-governing body of a county has objected to the location of one of its highways leading to the county-seat of an adjoining county, and has entered into the question of the proper route with the State Highway Commission, and thereafter, with consent of the county road-governing body a route has been selected without material variation from that given in the legislative map and fiat: *Held*, the power of the State Highway Commission to slightly or immaterially vary the location of the highway in question is not at an end until its final acceptance thereof, and the work thereon will not be enjoined thereafter, at the suit of the taxpayers of the county. Chapter 2, sec. 7, Public Laws of 1921. *Carlyle v. Highway Com.*, 193 N. C., 48; *Newton v. Highway Com.*, *ante*, 170, cited and approved.

APPEAL by plaintiffs from *Harris, J.*, at April Term, 1927, of WAYNE. Affirmed.

D. H. Bland and W. S. O'B. Robinson for plaintiffs.

Assistant Attorney-General Ross and Kenneth C. Royall for defendant.

CLARKSON, J. This is an action brought by plaintiffs against defendant in which the provisional remedy of injunctive relief is asked. A restraining order was granted plaintiffs and came on for final hearing at April Term, 1927, Wayne Superior Court. The court below, from the pleadings and affidavits, found the facts as shown by the record.

The material facts found for the determination of this action are as follows: "Section 5. From 31 May, 1921, to 28 September, 1926, the location of the Goldsboro-Snow Hill road was the subject of negotiations between the State Highway Commission and the Wayne County road authorities. A number of resolutions were passed by the Wayne Highway Commission, and the commissioners of Wayne County, and numerous personal interviews were had. At least six different locations were surveyed and discussed, and finally the location now contended for by the defendant was surveyed and adopted by the State Highway Commission, and formally accepted by the Wayne Highway Commission, by resolution offered in evidence dated 28 September, 1926."

Based on the finding of facts the court below held: "That the road from Goldsboro to Snow Hill, designated on the map as route 102, has not been definitely and finally located and taken over by the State Highway Commission prior to 28 September, 1926, and that the definite location thereof by said State Highway Commission on or about said date, as designated on the map offered in evidence, is a valid exercise of the authority conferred by law on said State Highway Commission. . . . It is, therefore, considered, ordered and decreed by the court that the restraining order heretofore issued in this cause be and the same is hereby dissolved."

We are of the opinion that the judgment of the court below on the facts found was correct.

In *Carlyle v. Highway Com.,* 193 N. C., at p. 48, this Court said: "We are, therefore, of the opinion that the statute means that when an existing highway has been designated, mapped, selected, established and accepted by the State Highway Commission as the sole and independent connection between two county seats in compliance with the formalities prescribed by the statute that this is a location of the road as a permanent link of the State System of Highways."

In *Newton v. Highway Com., ante,* at p. 170-1, this Court said: "(1) That the defendant, in the free exercise of its discretion, selected the existing road between Statesville and Newton as a permanent link of the State Highway System. (2) That in the construction of said road the statute authorizes the defendant to make such changes and relocations of said existing highway as it may deem necessary for the efficient and economical construction thereof. (3) That the road proposed by the defendant, indicated on the map as the orange line, or Line No. 3, is a radical departure from the highway already selected and incorporated by the defendant as a permanent link in the State Highway System, and that such proposed road is not a change or relocation of the highway selected, but is a totally new and independent project, and does not comply with the meaning and intent of the law as written."

Recognizing the now settled law in this jurisdiction, the defendant in its brief says: "We submit that, upon this statement of facts, abundantly supported and uncontradicted in the record, that the first and only location of the Goldsboro-Snow Hill road ever definitely settled and agreed upon between the State Highway Commission and the road governing body of Wayne County, was this location set out in the record, page 34, and adopted and approved 28 September, 1926, and that, under the doctrine of *Newton v. Highway Com., ante,* 159, and *Carlyle v. Highway Com.,* 193 N. C., p. 36, became final and constitutes 'a link or part of the State Highway System.' "

In the present action the road leading from Goldsboro to Snow Hill was never taken over in accordance with the laws of 1921, ch. 2, sec. 7. The facts as found disclose that the chairman of the State Highway Commission, on 26 April, 1921, mapped the roads for Wayne County, in accordance with the legislative map and fiat, and notified the road governing body of Wayne County, the Wayne Highway Commission.

Part of the section of the statute pertinent provides: "If no objection or protest is made by the board of county commissioners or the county road-governing body of any county, or street-governing body of any city or town in the State within sixty days after the notification before mentioned, then and in that case the said roads or streets, to which no objections are made, shall be and constitute links or parts of the State Highway System."

Immediately, on 29 April, 1921, the Wayne Highway Commission passed the following resolution, which was furnished the State Highway Commission: "Upon motion properly made, seconded and passed, it was ordered that the chairman and engineer present at the earliest practicable date a map to the State Highway Commission and chairman thereof, showing the location of the four following roads as shown upon the State highway map: (1) Goldsboro to Johnston County line; (2) Goldsboro to Lenoir County line; (3) Goldsboro to Duplin County line; (4) Goldsboro to Wilson County line, *and take up with them the advisability of making a new location of the road from Goldsboro to Snow Hill.*"

The facts found further disclose: "On 20 May, 1921, the Wayne Highway Commission accepted the four roads first above mentioned, but by resolution objected to the location of the Snow Hill road and instructed the chairman and engineer of the Wayne Highway Commission to take up with the State Highway Commission the advisability of making a new location of the road from Goldsboro to Snow Hill. On 31 May the Wayne Highway Commission by resolution instructed its chairman and engineer to investigate the best location of the Snow Hill road and submit a report to the Wayne Highway Commission. On 1 June, 1921, the State Highway Commission formally took over all the State highways in Wayne County except the Snow Hill road, and by letter notified the Wayne Highway Commission that these other roads were being taken over. During the summer of 1921 the State

Highway Commission erected highway signs along road shown by dotted line, which signs bore the designation 'N. C. 102'; and since that time the State Highway Commission has from time to time dragged said road, and made repairs thereon, but has not erected any permanent structures thereon, but the evidence discloses no formal acceptance by Wayne County."

The facts found are borne out by the records of the Wayne Highway Commission, and testimony of the engineer of the Wayne Highway Commission, who has been with it continuously since April, 1921, and others.

"In injunction proceedings this Court has the power to find and review the findings of fact on appeal, but the burden is on the appellant to assign and show error, and there is a presumption that the judgment and proceedings in the court below are correct." *Wentz v. Land Co.,* 193 N. C., at p. 34. The evidence was plenary to sustain the findings of fact.

It is now well settled in this jurisdiction that when the county roads were taken over under the law of 1921, ch. 2, sec. 7, and became links and parts of the State Highway System, no substantial or radical departure could be made. In the present case the road from Goldsboro to Snow Hill was not made a permanent link or part of the State Highway System until 28 September, 1926. See *Johnson v. Comrs.,* 192 N. C., p. 561.

This litigation was pending when chapter 46, Public Laws 1927, was enacted. The judgment below is

Affirmed.

STATE v. SPEIGHT W. WADFORD.

(Filed 5 October, 1927.)

Criminal Law—Indictment—Bill of Particulars—Courts — Discretion—Evidence—Scienter—Quo Animo.

The granting of a bill of particulars on an indictment for a criminal offense is to primarily inform the accused of the charges against him, and secondarily to inform the court, and while this not strictly a part of the indictment, its effect is to confine the State in its evidence to the particulars stated, and it is reversible error to the prejudice of the defendant's rights for the court to admit, over his objection, evidence as to other criminal offenses not included in the bill. C. S., 4613; Const. of N. C., Art. I, sec. 11.

APPEAL by defendant from *Sinclair, J.*, at May Term, 1927, of LENOIR.

Criminal prosecution tried upon an indictment charging the defendant (a person over the age of sixteen years) with embezzlement. C. S., 4268.

There is evidence tending to show that during the spring of 1926 the defendant, while in the employ of M. L. Shealey as "tank wagon salesman, truck route," collected in the course of his employment certain moneys for oil and gasoline sold and delivered to the customers of his employer, and fraudulently appropriated the same to his own use.

Before trial the solicitor, in response to a request from the defendant (C. S., 4613), furnished a bill of particulars, specifying six customers to whom it was alleged the defendant had delivered oil and gasoline, collected therefor, and embezzled the proceeds arising from said sales.

On the trial, and over objection, the State was permitted to offer evidence of two accounts of customers, not specified in the bill of particulars, which, it was contended, the defendant had collected and fraudulently converted to his own use.

From an adverse verdict and judgment thereon, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Shaw & Jones for defendant.

STACY, C. J. Does the filing of a bill of particulars in a prosecution for embezzlement confine the State in its proof to the items set down or enumerated therein?

The question is an important one, and seems not to have been heretofore directly presented in this State, though we have a statute on the subject, and many decisions which deal in a general way with the nature and purpose of a bill of particulars. C. S., 4613, and annotations. There is a dictum in *S. v. Van Pelt,* 136 N. C., 633, to the effect that, when the solicitor files a bill of particulars, either at the request of the defendant or on order of the court, the State is restricted in its proof "to the items therein set down"; and this was repeated in *S. v. Dewey,* 139 N. C., 556. The present case calls for a decision of the question.

The uniform current of authority in other jurisdictions, where the question has been considered, is to the effect that while the action of the trial court in ordering or refusing to order a bill of particulars is a matter of judicial discretion, nevertheless, when once ordered and furnished, the bill of particulars becomes a part of the record and serves

(1) to inform the defendant of the specific occurrences intended to be investigated on the trial, and (2) to regulate the course of the evidence by limiting it to the items and transactions stated in the particulars. *McDonald v. People,* 126 Ill., 150; *Commonwealth v. Giles,* 1 Gray, 466; *People v. McKinney,* 10 Mich., 54; *Starkweather v. Kittle,* 17 Wend., 21; Bishop Cr. Pro. (2 ed.), sec. 643; 14 R. C. L., 190; 31 C. J., 752.

"The office of a bill of particulars is to advise the court, and more particularly the defendant, of what facts, more or less in detail, the defendant will be required to meet, and the court will limit the government in its evidence to those facts, so set forth." *McPherson, District Judge,* in *U. S. v. Adams Express Co.,* 119 Fed., 240, quoted with approval in *U. S. v. Gouled,* 253 Fed., 239.

The true office of a bill of particulars is twofold. It is intended "to inform the defendant of the nature of the evidence, and the particular transactions to be proved under the information, and to limit the evidence to the items and transactions stated in the particulars." *People v. McKinney, supra.*

This view of the office and purpose of a bill of particulars is supported, in tendency at least, by our own decisions. In *S. v. R. R.,* 149 N. C., 508, it was said that the whole object of a bill of particulars is to enable the defendant properly to prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant in general terms of the accusation against him, is yet so indefinite in its statements as to the particular charge, or occurrences referred to, that it does not afford the accused a fair opportunity to procure his witnesses or prepare his defense. To like effect are the decisions in a number of other cases.

True, it is held with us that a bill of particulars is not a part of the indictment, nor a substitute therefor, nor an amendment thereto, and that it may not be used to supply an omission or to cure a defect therein. Hence, a bill of particulars can neither change the offense charged nor aid an indictment fundamentally bad, though it may remove an objection on the ground of uncertainty. *S. v. Gulledge,* 173 N. C., 746; *S. v. Cline,* 150 N. C., 854 (disapproved on another point in *S. v. Hawley,* 186 N. C., 433); *S. v. Long,* 143 N. C., 671; *S. v. Van Pelt, supra.* The application for a bill of particulars is addressed to the sound discretion of the trial court, and his ruling thereon is not reviewable on appeal, except perhaps in case of manifest abuse of discretion. *S. v. Hinton,* 158 N. C., 625; *S. v. Dewey, supra.* A bill of particulars, being no part of the indictment, is not subject to demurrer, and may be amended at any time, with permission of the court, on such terms or under such conditions as are just. *Townsend v. Williams,* 117 N. C., 330.

Again, it is provided by C. S., 4613, that "in all indictments, when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters."

It will be observed that, by the terms of this statute, a bill of particulars is ordered when "desirable for the better defense of the accused." Its purpose is to give him notice of the specific charge or charges against him and to apprise him of the particular transactions which are to be brought in question on the trial, so that he may the better or more intelligently prepare his defense, and its effect, when furnished, is to limit the evidence to the transactions set out therein. *People v. Depew,* 237 Ill., 574. Unless this be its purpose, instead of making for a fair trial, it might tend to entrap the defendant and throw him off his guard, or what is worse "prove to be a snare and a delusion." *McDonald v. People, supra.* The granting or refusing of the motion for a bill of particulars is, in the first instance, however, within the sound discretion of the trial court. *DuBois v. People,* 200 Ill., 157, 65 N. E., 658; 93 A. S. R., 183, and note.

The competency of the evidence, here in question, to establish *scienter,* or *quo animo,* under the principle announced in *S. v. Dail,* 191 N. C., 231, and cases there cited, may not be resolved against the statutory effect to be given to a bill of particulars, which, when ordered and furnished, has as its purpose the limitation of the evidence to the particular scope of inquiry. Unless the statute is to be given this effect, a bill of particulars is perhaps of little value, and certainly of doubtful benefit, to the defendant. The Legislature intended that it should make for the better or more intelligent defense of the accused, in compliance with Art. I, sec. 11, of the Constitution, which provides that, "in all criminal prosecutions, every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony." The State is rightly interested in the conviction of the guilty, or those who have violated the criminal law, but as a safeguard against the possible conviction of the innocent, or those who have not violated the criminal law, it is decreed, both by legislative enactment and judicial decision, that every criminal prosecution shall be conducted in accordance with the established rules of procedure.

There are other matters appearing on the record worthy of consideration, especially the form of the judgment, but as they are not likely to occur on another hearing, we shall not consider them now.

The case, in some of its features, is not unlike *S. v. Klingman,* 172 N. C., 947.

For error in the reception of evidence, over objection, of transactions not specified in the bill of particulars, there must be a new trial; and it is so ordered.

New trial.

H. R. GARRIS v. J. K. YOUNG AND YOUNG MERCANTILE COMPANY, A CORPORATION.

(Filed 5 October, 1927.)

Damages—Arrest—Pleadings—Demurrer.

No cause of action is alleged in the complaint upon allegations that defendant who was on his appearance bond to appear at court upon appeal from a misdemeanor, misinformed the plaintiff that the cost of the prosecution had been paid and he was discharged, and in consequence of this erroneous statement he had been taken on a capias and incarcerated, thereby sustaining the damages in suit.

APPEAL by plaintiff from *Cranmer, J.,* at March Term, 1927, of PITT. Affirmed.

S. J. Everett for plaintiff.
Skinner, Cooper & Whedbee and Albion Dunn for defendant.

PER CURIAM. The substantial allegations of the complaint are that on 1 November, 1924, the plaintiff was employed by J. K. Young, manager of the Young Mercantile Company, to advertise the company in the town of Greenville, and while so engaged he was arrested for violating an ordinance of the town. The manager then requested him to appear before the proper court and, if convicted, to appeal to the Superior Court in term. In the mayor's court he was convicted and appealed, the defendant Young signing his appearance bond as surety. Thereafter the plaintiff inquired of Young as to the disposition of the case, and was told that the cost had been paid and that the plaintiff had been discharged, and was not required to attend the court. He alleged that he did not attend and that his absence was the result of Young's failure to pay the cost; that he was arrested under an order of the Superior Court on account of delinquent costs and imprisoned all night and a part of the next day, and then brought into court and held in custody, and that in consequence of the wrongful acts of the defendants he had been damaged in the sum of $5,000. The defendants demurred *ore tenus;* the demurrer was sustained, the action dismissed, and the plaintiff appealed.

The plaintiff knew that he had given a bond for his appearance in the Superior Court, and he is presumed to have known that in case of default he would be subject to arrest under a capias. It has been said, "When a man has a case in court the best thing he can do is to attend to it; if he neglects to do so he cannot complain." *Pepper v. Clegg,* 132 N. C., 312. The plaintiff should have observed this injunction and not relied upon the statement of Young under the circumstances alleged in the complaint. We have discovered no sufficient ground upon which to base a recovery.

Affirmed.

NANCY H. SAWYER, BY HER NEXT FRIEND, J. C. SPENCE, v. RAY TOXEY, HUBERT TOXEY, MINNIE TOXEY WILSON, MARY L. TOXEY, MARY A. SAWYER, J. C. SAWYER, JR., MARTHA SAWYER, J. C. SAWYER, SR., AUBREY GALLOP, FLORENCE GALLOP, MARGARET SAWYER, ROLAND M. SAWYER, P. G. SAWYER, SR., P. G. SAWYER, JR., M. B. SAWYER, AND M. B. SAWYER, EXECUTOR OF M. N. SAWYER, DECEASED, STELLA GALLOP, MINNIE G. WHITEHURST, AND ANY AND ALL GRANDCHILDREN OF M. N. SAWYER, DECEASED, EITHER IN BEING OR NOT IN BEING.

(Filed 12 October, 1927.)

1. **Wills—Intent — Interpretation — Beneficiaries as a Class — Death of Testator.**

Where the grandchildren of the testator are to take under the will as a class, being designated by name as the children of certain of his children, and there is no precedent estate or interest to intervene, the intent of the testator is construed and given effect with reference to his death, nothing else appearing.

2. **Same—Date of Will—After-born Children.**

Where the grandchildren of the testator take under his will as a class as of the date of his death, and there is a further provision of the will as to other grandchildren born after the date of the will, the further provision applies to such other grandchildren who are alive at the time of testator's death, and not to those who may thereafter be born.

APPEAL by respondents from *Clayton Moore, Special Judge,* at June Term, 1927, of PASQUOTANK. Affirmed.

This was a special proceeding, brought before the clerk of the Superior Court of Pasquotank County by the plaintiff, petitioner, against the defendants, respondents, to sell certain real estate, stocks, notes, etc., to make a division. An appeal was taken from the final decree of the clerk to the judge of the Superior Court. The court below confirmed and approved the clerk's decree, and respondents excepted, assigned error and appealed to the Supreme Court.

The material facts will be set forth in the opinion.

Thompson & Wilson for petitioner.
P. G. Sawyer for respondents.

CLARKSON, J. M. N. Sawyer died on 29 August, 1925, leaving a last will and testament, dated 11 December, 1922. The material parts for a decision of the action are:

"2. I give and devise my old home where I now live and part of the barn lot adjoining the same to my son, Roland M. Sawyer, in fee, but I tax the old home and the barn lot adjoining the same in the sum of six thousand dollars to be paid by my son, Roland M. Sawyer, to my grandchildren as follows: To Mary L. Toxey's children one share; to J. C. Sawyer's children one share; to M. B. Sawyer's children one share; to Florence Gallop's children one share; to P. G. Sawyer's children one share; to Roland M. Sawyer's children one share, or any other of my children who may have children borned to them after the date of this will, shall receive equally with those above mentioned and in the same manner as above mentioned.

"3. I give and devise all of my real estate of every kind and description (except the old home and barn lot) all of my notes, bonds, stock, money, insurance, household and kitchen furniture—in fact everything I have at the time of my death not otherwise disposed of, to my grandchildren in the same manner and form as I have above described it in item second.

"4. It is my will and desire that my son, Roland M. Sawyer, pay to all of my grandchildren who are 21 years of age their part of the six thousand dollars due them within one year after my death, and those who are not 21 years old he shall deposit their money in some savings bank to be used by their guardian for their benefit."

The testator left surviving him eight children, to wit: (1) Mary L. Toxey, (2) J. S. Sawyer, (3) M. B. Sawyer, (4) Florence Gallop, (5) P. G. Sawyer, (6) Roland M. Sawyer, (7) Stella Gallop, (8) Minnie G. Whitehurst.

At the time of the death of said M. N. Sawyer, (1) Mary L. Toxey had three children: Ray Toxey, Hubert Toxey, Minnie Toxey Wilson. (2) J. S. Sawyer had three children: Mary A. Sawyer, J. C. Sawyer, Jr., and Martha Sawyer. (3) M. B. Sawyer had one child: Nancy H.

Sawyer (petitioner by her next friend). (4) Florence Gallop had one child: Aubrey Gallop. (5) P. G. Sawyer had one child: P. G. Sawyer, Jr. (6) Roland M. Sawyer had one child: Margaret Sawyer. Neither Stella Gallop nor Minnie G. Whitehurst had any children, they now being 56 and 54 years of age, respectively.

The above status with respect to the different children and grandchildren continues unchanged at the present time. None have died and no others have been born.

The judgment of the clerk, approved by the court below on appeal, ordered, decreed and adjudged that the division be as follows: "That Nancy H. Sawyer, only child of M. B. Sawyer, is entitled to a one-sixth interest in the amount now in the hands of said M. B. Sawyer, commissioner, and in any amount which may hereafter come into his hands by virtue of the sale hereafter to be made of the stock in the Crystal Ice and Coal Corporation of Washington, North Carolina; that the defendants, Ray Toxey, Hubert Toxey and Minnie Toxey Wilson, children of Mary L. Toxey, are together the owners of one-sixth interest in said amounts; and that the defendants, Mary A. Sawyer, J. C. Sawyer, Jr., and Martha Sawyer, the children of J. C. Sawyer, are together the owners of one-sixth interest in said amounts; that the defendant, Aubrey Gallop, sole child of Florence Gallop, is the owner of one-sixth interest in said amounts; that the defendant, Margaret Sawyer, sole child of Roland M. Sawyer, is the owner of one-sixth interest in the said amounts; and that the defendant, P. G. Sawyer, Jr., sole child of P. G. Sawyer, is the owner of one-sixth interest in the said amounts." In the judgment we can see no error.

In *Walker v. Johnston,* 70 N. C., at p. 579, the principle is thus stated: "When a legacy is given to a class, as to the children of A., with no preceding estate, only such as can answer to the call at the death of the testator can take, for the ownership is then to be fixed, and the estate must devolve upon those who can answer the description. So children of A., born after the death of the testator, are excluded, as are also the children of a child of A., such child having died before the testator, for these children of a child of A. do not fill the description. But when there is a preceding life estate so that the ownership is filled for the time, and there is no absolute necessity to make a peremptory call, for the takers of the ultimate estate, the matter is left open until the determination of the life estate, with a view of taking in as many of the objects of the testator's bounty as come within the description and can answer to the call, when it is necessary for the ownership to devolve and be fixed." *Carroll v. Hancock,* 48 N. C., 471; *Mason v. White,* 53 N. C., 421; *Wise v. Leonhardt,* 128 N. C., 289; *Fulton v. Waddell,* 191 N. C., 688.

"Unless the context of the will shows an intention to include after-born children, a direct gift to children as a general rule includes those living at the time of the testator's death, to the exclusion of those born afterwards." 40 Cyc., 1479 (Wills).

The roll of the class is called at the death of the testator under the will in controversy. This is the rule of law well settled in this State. Construing Item 3 with Item 2, the clear language of Item 3 is that all of testator's real and personal property, *"in fact everything I have at the time of my death not otherwise disposed of to my grandchildren in the same manner and form as I have above described it in Item second."* In Item 2 the manner and form is *to Mary L. Toxey's children one share,* etc., *"or any other of my children who may have children borned to them after the date of this will,"* is limited to those born before testator's death. In fact, Item 4 says: It is my will and desire that the $6,000 legacy be paid to the grandchildren, if of age, and if not of age to be deposited in some saving bank to be used by their guardian for their benefit. This is to be done within one year after testator's death. This convincingly shows that the testator himself by his will called the roll of the class at his death. The judgment below is

Affirmed.

J. B. COLT COMPANY v. W. R. CONNER.

(Filed 12 October, 1927.)

Contracts—Written Instruments—Evidence—Parol Evidence—Statute of Frauds—Fraud—Principal and Agent.

Where the contract for the sale of a home electric-lighting machine and fixtures is in writing and expressly excludes all verbal representations made by the seller's agent not therein contained, evidence in behalf of the purchaser as to the cost of operation not contained in the written instrument is a modification or variance thereof, and evidence thereof alone is properly excluded for that reason, and also for being merely promissory of what the machine sold would do in the future, and standing alone is insufficient to invalidate the contract itself as being fraud in the factum.

CIVIL ACTION, before *Cranmer, J.,* at April Term, 1927, of CRAVEN.

The plaintiff brought suit against the defendant upon certain notes aggregating $300, having been executed and delivered by the defendant to the plaintiff in payment of the purchase price of a certain lighting plant and fixtures. The notes were dated 22 June, 1923. The contract between the parties was in writing and contained a written warranty, and in addition the following clause: "It being understood that this instrument contains all of the terms, conditions and agreements between the purchaser and the company, and that no agent or representative of the company has made any statements, representations or agreements, verbal or written, modifying or adding to the terms and conditions herein set forth. The company does not install the generator or appliances. It is further understood that upon the acceptance of this order, the contract so made cannot be canceled, altered or modified by the purchaser or by any agent of the company or in any manner except by agreement in writing between the purchaser and the company acting by one of its officers."

The defendant admitted the execution of the notes, but alleged that at the time of the sale the agent of the plaintiff, "as an inducement to the defendant to purchase the same, represented and stated as of his own knowledge and as of the knowledge of the plaintiff, that in the operation of said plant a charge of 200 pounds of carbide would operate the machine and cause it to produce the lights for eight or nine months."

The defendant further alleged "that this representation so made was false in that 200 pounds of carbide would only operate the machine fifty-three days, and that by reason of such false representation the defendant had been damaged," etc. The evidence further disclosed that plaintiff could read and write.

At the conclusion of the evidence the judge instructed the jury to answer the issue of indebtedness in favor of the plaintiff.

From the judgment rendered the defendant appealed.

Powers & Elliott for plaintiff.
Ward & Ward for defendant.

BROGDEN, J. The defendant pleaded fraud as a defense to the notes sued upon. There was no allegation and no evidence that there was fraud in the factum, but that certain oral representations made by the agent of the plaintiff at the time the contract was executed were false and fraudulent, and were made as an inducement to enter into the contract. Thereupon, at the trial the defendant offered evidence of certain representations made by the agent of the plaintiff with respect to the amount of carbide requisite for operating the machine. These oral representations amounted to no more than representation as to the cost of the operation of the machine. The trial judge excluded the evidence tendered, which ruling is the decisive point in the case. The contract was in writing, and the defendant could read. The express terms of the contract excluded oral representations of the nature defendant proposed to offer. "Having executed the contract, and no fraud appearing in the procurement of the execution, the court is without power to relieve the defendant on the ground that he thought it contained provisions which it does not. He is concluded thereby to the same extent as if he had known what due diligence would have informed him of, to wit, its plain provision that the agent had no authority to make agreements other than those contained therein, and that such agreements, if made, were not a part of the contract." *Varser, J.*, in *Colt v. Kimball,* 190 N. C., 169.

The oral declarations offered by the defendant were "promissory representations" looking to the future as to what could be done with the machine and as to the low cost of operation, and were in direct conflict with the provisions of the contract which expressly excluded such declarations. *Cash Register Co. v. Townsend,* 137 N. C., 652; *Pritchard v. Dailey,* 168 N. C., 330; *Colt v. Springle,* 190 N. C., 229.

Upon the record we conclude that the ruling of the trial judge was correct, and the judgment is

Affirmed.

I. M. L. BROCK v. J. R. FRANCK.

(Filed 12 October, 1927.)

Limitation of Actions—Mutual Running Accounts—Debtor and Creditor.

A mutual running account between the parties so as to bring it within the terms of our statute, barring an action by one of the parties against the other three years after the last transaction between them, C. S., 421, finds no application when there is only an extension of credit for merchandise sold by one of them to the other on open account and payment thereon by the other, and the statute, as a matter of law under the facts, will begin to run from the date of each purchase as to the item itself, unless the bar has been repelled in some recognized legal manner.

APPEAL by plaintiff from *Sinclair, J.*, and a jury, at March Term, 1927, of ONSLOW. New trial.

The material facts will be set forth in the opinion.

Summersill & Summersill and D. L. Ward for plaintiff.
Dawson & Jones and Shaw & Jones for defendant.

CLARKSON, J. The plaintiff brings this action against defendant to recover $850.45, balance due, and alleges "that the entire account owed by this defendant is an *open and running account.*"

The defendant pleads the statute of limitations, as follows: "That any items of indebtedness due or alleged to be due, which this defendant denies, were procured prior to three years before the institution of this action, and this defendant specifically pleads the three-year statute of limitations in complete bar of the plaintiff's right to recover on such accounts."

This action was commenced by the summons being issued on 24 May, 1926, and served on defendant on 29 May, 1926. The testimony of plaintiff shows that he is engaged in farming and merchandising; that the defendant traded with him on a credit basis during the year 1919, and owed him on 1 January, 1920, $654.41; also in 1921, and that year left a balance of $137.39; also in 1922, and that year left a balance of $153.85, and other amounts, making a total of $850.45. Plaintiff further testified that the account goes through the spring of 1923, and is a continuing account all the way through; the last credit is for seed $7.10 paid September, 1923; $245.00 was paid by defendant on 24 June, 1924, and after giving defendant all credits he owes $850.45.

Whether or not there is any evidence is a question of law. If there is any evidence, its weight is for the jury. We do not think there was any evidence tending to show a *mutual,* open and current account. In fact, plaintiff alleges the account is an *open and running account.* Where there are *mutual* accounts, the three-year statute runs from the last dealing between the parties. C. S., 421; *Robertson v. Pickerell,* 77 N. C., 302; *Stokes v. Taylor,* 104 N. C., 394.

C. S., 421, is as follows: "In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action accrues from the time of the latest item proved in the account on either side."

In construing this statute *Hoke, J.,* in *Hollingsworth v. Allen,* 176 N. C., at p. 631, says: "Under the authorities referred to, however, and many others could be cited, such a principle does not apply to a case of opposing but unrelated demands between the parties, nor to an ordinary store account, though open and continued, where the credit is all on one side and the only items of discharge consist in payments on account. In this last case, unless there has been a payment within the statutory period or some binding recognition of the account within such time, the statute runs from the date of each item. And the charge of his Honor, which, on the record, as we understand it, extends the principle applicable, in case of mutual accounts, to an ordinary store account, must be held for error." *McKinnie v. Wester,* 188 N. C., p. 514.

In 39 A. L. R., p. 372-n, it is said: "The rule stated in the annotation in 1 A. L. R., 1068, as supported by the weight of authority, that an account consisting of charges on one side and payments on the other is not a mutual account, is adhered to in the following cases: *Carter v.*

Canty (1919), 181 Cal., 749, 186 Pac., 346; *Furlow Pressed Brick Co. v. Balboe Land and Water Co.* (1921), 186 Cal., 754, 200 Pac., 625; *Shuler v. Corl* (1918), 39 Cal. App., 195, 178 Pac., 535; *Baze v. Hearn* (1925) .... Ga. App., ..., 127 S. E., 479; *Crump v. Sefton* (1918), 172 N. Y. Supp., 338; *Sanger & Jordan v. Duncan* (1921), 196 App. Div., 55, 187 N. Y. Supp., 604; *Hollingsworth v. Allen* (1918), 176 N. C., 629, 97 S. E., 625; *Sharp v. Miller* (1923), 94 Okla., 217, 221 Pac., 747; *Dillard v. Dugger Grocery Co.* (1921), ... Tex. Civ. App., ..., 232 S. W., 360. Thus, an ordinary store account, consisting of charges on one side and payments on the other, is not a mutual account. *Hollingsworth v. Allen* (1918), 176 N. C., 629, 97 S. E., 625."

The rule adopted in this jurisdiction is well stated in the above quotations from A. L. R.

Defendant preserved his rights by duly excepting and assigning errors. The other questions are not necessary to be determined.

For the reasons given there must be a

New trial.

T. W. GRAY ET UX. v. T. W. MEWBORN, TRADING AS T. W. MEWBORN & CO. ET AL.

(Filed 12 October, 1927.)

1. **Equity—Suits—Actions—Parties—Mortgages—Priorities — Fraud — Mistake—Register of Deeds—Index.**

   Equity will entertain a suit by the mortgagor to correct a mortgage which through fraud or mistake or the negligence of the register of deeds in cross-indexing has failed to give a priority of lien to one of several mortgagees entitled thereto, and the mortgagor is held to be a proper party plaintiff for the purposes of the suit. C. S., 446.

2. **Same—Pleadings—Demurrer.**

   Where the mortgagor alleges sufficiently facts tending to prove that through fraud or mistake or error in the register of deeds failing to properly cross-index a mortgage, one of several of the mortgage lienors on the land has been wrongfully deprived of his priority of lien over another mortgagee, a demurrer to the complaint should not be sustained.

3. **Judgments—Estoppel—Res Judicata—Mortgages—Foreclosure—Liens —Equity.**

   A mortgagor is not estopped by judgment in a foreclosure proceeding on his lands from setting up by independent suit the facts that through fraud or mistake, etc., another mortgagee of the same lands had been deprived of his priority of lien when in the proceedings to foreclose the matter was neither set up nor litigated.

APPEAL by defendants from *Sinclair, J.,* at May Term, 1927, of LENOIR.

Civil action to reform mortgage and deed of trust given to secure the same debt, so as to make said instruments conform to the real intention of the parties, and render them subsequent rather than prior liens to a mortgage of earlier date, but which was not properly cross-indexed until after the registration of these later instruments.

The material allegations of the complaint, so far as essential to a proper understanding of the legal questions involved, may be abridged and stated as follows:

1. On 21 December, 1920, the plaintiffs executed to T. W. Mewborn a mortgage on certain lands in Lenoir County, intending to make said mortgage subject to several prior mortgages on the same property, and in an endeavor to effectuate this understanding, Mewborn, who drew the instrument, inserted the following language in the warranty clause: "That the same are free from all encumbrance whatsoever except $2,130 to Hadley Gray, $204 to H. C. Wooten, $1,000 to Parham, Sugg and Herring on tract No. 1; and $1,800 to George W. Garris on tracts Nos. 2 and 3." This mortgage was duly registered 6 February, 1921.

2. The prior mortgage of $2,130, given to Hadley Gray, was executed 21 December, 1920, and registered immediately, but through error or inadvertence on the part of the register of deeds, it was not cross-indexed until such mistake was discovered in February, 1923.

3. During January, 1924, suit was brought in the Superior Court of Lenoir County to foreclose the mortgage of $204, given to H. C. Wooten. In this action it was adjudged that the Mewborn mortgage was entitled to take precedence over the Gray mortgage in the distribution of the surplus, because of the failure of the register of deeds properly to cross-index said mortgage at the time of its registration.

4. The plaintiffs filed no answer in the foreclosure proceeding and did not know that priority was to be given to the Mewborn mortgage over the Gray mortgage until the decree was entered in that cause.

5. This suit is brought by the mortgagors to have the Mewborn mortgage reformed and the judgment in the foreclosure proceeding modified so as to effectuate the intention of the parties by making the Mewborn mortgage subject to the Gray mortgage as well as other liens mentioned in the warranty clause above, to the end that the plaintiffs may deal justly and fairly with their respective creditors.

From a judgment overruling a demurrer, interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action, in that, it is asserted, (1) no equity is shown, and (2) plaintiffs are estopped by the judgment in the foreclosure proceeding, the defendants appeal, assigning error.

Wallace & Pridgen and McLean & Stacy for plaintiffs.
Rouse & Rouse for defendants.

STACY, C. J., after stating the case: The defendants, by their demurrer, admit, for the purpose of testing the sufficiency of the complaint (*Brick Co. v. Gentry,* 191 N. C., 636), that it was the intention of the parties, at the time of the execution and delivery of the Mewborn mortgage, to make it subject to other liens, including the Gray mortgage, and that, through fraud or mistake, reference to the prior encumbrances was inserted in the warranty clause rather than in the premises or habendum of said instrument, which was held to be insufficient in the foreclosure proceeding (*Quere? Hardy v. Abdallah,* 192 N. C., 45; *Hardy v. Fryer, post,* 420); and, further, that by reason of an error or inadvertence on the part of the register of deeds, the Gray mortgage was not properly cross-indexed at the time of its registration. *Clement v. Harrison,* 193 N. C., 825; *Bank v. Harrington, ibid.,* 625. The defendants, therefore, concede, for present purposes, that their claim of priority is bottomed on mutual mistake or fraud and error. Such a claim ought not to prevail. Equity will not deny to an honest debtor, who wishes to deal justly with his creditors, an opportunity to be heard in a matter of this kind. His interest is more than moral; it is legal. The contract was made with him. He is the real party in interest, and in no sense a volunteer. C. S., 446.

Pretermitting the question as to whether *res adjudicata* or estoppel may be pleaded, other than by answer (*Upton v. Ferebee,* 178 N. C., 194), we deem it sufficient to say that the gravamen of the plaintiffs' complaint was neither set up nor litigated in the foreclosure proceeding. *Crump v. Love,* 193 N. C., 464; *Polson v. Strickland, ibid.,* 300; *Holloway v. Durham,* 176 N. C., 550; *McKimmon v. Cault,* 170 N. C., 54; *Clarke v. Aldridge,* 162 N. C., 326; *Gillam v. Edmonson,* 154 N. C., 127. Hence, the authorities cited by appellants, *Wagon Co. v. Byrd,* 119 N. C., 462, and others, are not controlling on the allegations presently appearing of record.

The doctrine announced in *Power Co. v. Casualty Co.,* 193 N. C., 618, is not at variance with this position.

The demurrer was properly overruled.

Affirmed.

L. J. HARDISON v. NATIONAL HANDLE COMPANY.

(Filed 12 October, 1927.)

Navigable Waters—Logs and Logging—Fishing—Negligence—Damages.

While the rights of navigation are ordinarily paramount in a navigable stream to those of fishing therein, they should be freely and fairly enjoyed together except in case of conflict; and where in floating logs down a stream the negligence of the defendant has unnecessarily caused damages to the plaintiff's fishing machine, the former is held liable therefor.

APPEAL by defendant from *Nunn, J.*, at January Term, 1927, of WASHINGTON.

Civil action to recover damages for an alleged negligent injury to one of plaintiff's fishing machines.

Upon denial of liability, and issues joined, the jury found that the defendant, while floating a raft of logs down the Roanoke River, a navigable stream, unnecessarily and negligently injured one of plaintiff's fishing machines, stationed in said river, and assessed the damages at $37.00.

From a judgment on the verdict in favor of plaintiff the defendant appeals, assigning errors.

A. R. Dunning for plaintiff.
Zeb Vance Norman for defendant.

STACY, C. J. In the brief of counsel for plaintiff it is stated: "We are told that the lotus flower grows only in two rivers, the Nile and the Roanoke. The fishing machine, the subject-matter of this action, so far as I know, is not used anywhere except in the Roanoke River."

Defendant's chief exception is the one addressed to the refusal of the trial court to grant its motion for judgment as of nonsuit, urged principally upon the ground that no liability attaches for injury done plaintiff's fishing machine by the defendant's raft of logs because the right of navigation is superior to the right of fishing in a navigable stream.

The latest expression on the subject is to be found in *Spruill v. Mfg. Co.*, 180 N. C., 69, where *Brown, J.*, delivering the opinion of the Court, said: "Although the right of navigation in navigable waters is ordinarily paramount to the right of fishing therein, where the rights conflict, yet where both can be freely and fairly enjoyed, the right of navigation has no right to trespass upon and injure the right of fishing, and in such cases the owners of a vessel will be liable for damages caused to fishermen by the negligent navigation of their vessel, although they do not act maliciously or wantonly."

This is not at variance with the rule first stated in *Lewis v. Keeling,* 46 N. C., 299, and followed in a number of later decisions, to the effect that the right of navigation is superior to the right of fishing in the waters of a navigable stream. It was said in that case: "There must be no wantonness or malice, no unnecessary damage, but a bona fide exercise of the paramount right of navigation."

The instant case was tried upon the principle announced in the *Spruill* and *Lewis cases,* and we find no cause to disturb the verdict.

No error.

R. H. MITCHELL ET UX. v. J. W. MOORE ET UX.

(Filed 12 October, 1927.)

1. **Vendor and Purchaser—Misrepresentation as to Amount of Purchase Price—Justice of the Peace—Jurisdiction of Court—Courts.**

   Where the purchaser of lands assumes an existing mortgage debt thereon and partly pays the difference and assumes the balance of the purchase price, he may recover in his action by the seller in the jurisdiction of the justice of the peace, the sum of $86, the difference between the actual amount of the existing mortgage indebtedness and the amount it was represented to be as an unjust enrichment of the seller, and the defense that the mortgage was a matter of record giving constructive notice of the amount due is not tenable.

2. **Same—Equity—Reformation of Instruments—Supreme Courts — Appeal and Error.**

   Where the seller has misrepresented the amount of money due on a mortgage existing on the lands sold to the loss of the purchaser, and the difference falls within the jurisdiction of the justice of the peace, the equitable doctrine of reforming a written instrument has no application, and where the purchaser has brought his action in the court of a justice of the peace, the defense on appeal to the latter court that it could acquire no derivative jurisdiction is untenable. The distinction between the jurisdiction of the court in declaring an equity and enforcing a money demand which equitably belongs to a party, distinguished.

APPEAL by defendants from *Devin, J.,* at second May Term, 1927, of WAKE. No error.

Thos. W. Ruffin for plaintiffs.
J. C. Little for defendants.

ADAMS, J. This was a civil action heard on an appeal taken by the defendants from the judgment of a justice of the peace. In December, 1923, the plaintiffs purchased from the defendants a house and lot and agreed to pay therefor the sum of $5,500. They paid $500, assumed a first mortgage indebtedness represented by the defendants to be $2,846.94 due the Acacia Mutual Life Association, and secured the remainder by the execution of a second mortgage. The amount originally due the Life Association was $3,000, and the defendants told the plaintiffs they had paid thereon $153.06, thereby reducing the indebtedness to $2,846.94. The plaintiffs alleged that they had afterwards learned that in the payment of $153.06 was included the sum of $88, which was interest on the debt and not a part of the principal which they had agreed to pay. The object of the action is to recover this sum as an overcharge or a sum in excess of the agreed price. Under instructions, to which there was no exception, the jury returned a verdict finding that the plaintiffs were entitled to a credit of $86.00 as a charge in excess of the sum due on the first mortgage. There was a motion for nonsuit on the ground that the mortgage was a matter of record, and that all the facts were known to the plaintiff when the trade was made. The motion was denied.

One of the sources of obligations created by *quasi*-contracts is the receipt of a benefit, the retention of which, without compensation, would constitute "unjust enrichment," illustrated by money paid under a mistake of fact. Woodward, *Quasi*-Contracts, sec. 1. If the defendants were not entitled to the alleged overcharge, a fact made certain by the verdict, they had no right to retain it. The principle as stated by Greenleaf is quoted in *Bahnsen v. Clemmons,* 79 N. C., 556: "When the defendant is proved to have in his hands the money of the plaintiff, which *ex equo et bono* he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly; and after verdict the promise is presumed to have been actually proved."

The appellants interposed a demurrer on the ground that a justice of the peace had no jurisdiction of the action and that as the jurisdiction of the Superior Court was derivative, none was acquired by the appeal. The action was brought, not to correct or reform the note, but to recover money which otherwise would go to the "unjust enrichment" of the defendants. This will appear by reference to the justice's summons which, in the absence of a more formal pleading, may be regarded as a substitute for the complaint. *Allen v. Jackson,* 86 N. C., 321; *Cromer v. Marsha,* 122 N. C., 563; *Parker v. Express Co.,* 132 N. C., 128. For this reason we need not advert to decisions dealing with the question whether a justice of the peace in any event can administer equitable relief. There is a distinction, however, between declaring an equity and enforcing the collection of money which equitably belongs to a party. *Fidelity Co. v. Grocery Co.,* 147 N. C., 510; *Stroud v. Ins. Co.,* 148 N. C., 54.

No error.

MANLY TAYLOR, ADMINISTRATOR OF WILLIS TAYLOR, DECEASED, v. ROWLAND LUMBER COMPANY.

(Filed 12 October, 1927.)

1. **Negligence—Master and Servant—Employer and Employee—Evidence—Speculation—Verdict—Reversal—Railroads—Tramroads.**

   Where evidence tends only to show that the plaintiff's intestate was employed as a fireman on the defendant lumber company's tramway steam locomotive hauling cross-ties on flat cars attached, loaded in the customary manner, and was seen immediately before the injury on the ground in front of the slowly backing train too late to stop the train that killed him, and there is no evidence of defects in equipment or in the conduct of the defendant's other employees operating the train that would tend to show any negligence on the defendant's part: *Held,* the evidence as to defendant's negligence is too uncertain, vague, speculative and remote to sustain a verdict of damages in the plaintiff's favor.

2. **Same—Violation of Employer's Rule for Safety.**

   Where the evidence only tends to show that the defendant company's engineer on its tram locomotive came to his death by reason alone of his violating a rule of the company adhered to by the defendant not to jump from a running train, it is insufficient to take the case to the jury, there being no further evidence of the defendant's negligence in causing the death.

CIVIL ACTION, before *Cranmer, J.,* at Spring Term, 1927, of JONES.

The evidence tended to show that the plaintiff, a young colored man about 22 years old, was employed as fireman on a tram-road engine owned by the defendant. It was his duty to throw the switch. The engine and one car coupled to it, loaded with cross-ties, had pulled up on a spur-track to let another train pass. After the train passed the engine and car of cross-ties were backed out of the spur-track, and it became necessary for plaintiff's intestate to throw the switch.

Witness for plaintiff testified: "I told Willie Taylor to shift out, him and the engineer, and to let the other train go by, and they let the other train go by, and when they went by he got off for something, and when I saw him he was on his hands and knees. I didn't see him when he got off. Some of them said he jumped down ahead of it, and the train was running by and he fell. I saw him when he raised up, and the drawhead of the car hit him in the back and the sand bolster run over him. It was on a side-track, a switch from the main line. . . . I saw him on his hands and knees, and I saw a sand bolster run over him. The train was backing at that time. The back car had a few ties on it; they were loaded crossways of the car. . . . I don't know how high the ties were. I don't think they were very high. We didn't have but eight rails on the car at the time, and that would not take many ties. . . . The train was going about three or four miles an hour when he was killed. . . . The ties were not as high as we ordinarily have them, and they had no effect on his being hurt. . . . The cross-ties were loaded all right. When I first saw the boy he was on his hands and knees just off the car, and the car was on him so quick that nobody could do anything. We flagged the train as quick as we could, but the bumper struck him as soon as he fell off. . . . It was my instruction that nobody should get off those cars while the engine was moving, and Willie Taylor knew it. . . . It was against orders for a man to get on or off a car in motion. Willie Taylor had been working there two or three months, and he took orders and instructions from me."

Another witness for plaintiff testified: "I can't say I saw him killed, because I didn't see him fall off, and neither did I see him because I was working. When I saw him, I said, 'Lord have mercy,' and I jumped out there and said: 'The ties is piled so high the engineer couldn't see that man.' . . . The car dragged the body about four feet before it stopped. . . . When I first saw Willie the car was right on him. The engine stopped in about four feet, which was just as quick as it could possibly have stopped. The ties were not piled up any higher than usual. . . . It was against the orders of Mr. Everton for us to get on or off the train while it was moving, and everybody had those orders."

This was substantially all the evidence for plaintiff.

The issues and answers of the jury thereto were as follows:

1. Was the plaintiff's intestate, at the time of his injury, employed and working for Geo. L. Everton? A. Yes.

2. Was the said Geo. L. Everton an independent contractor, as alleged in the answer? A. No.

3. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged? A. Yes.

4. Was the plaintiff's intestate guilty of contributory negligence, as alleged in the answer? A. No.

5. What damage, if any, is the plaintiff entitled to recover of the defendant? A. $750.

From judgment upon the verdict the defendant appealed.

Sutton & Greene for plaintiff.
Moore & Dunn for defendant.

BROGDEN, J. The evidence of the plaintiff does not disclose how the killing of plaintiff's intestate occurred. Only two theories arise from plaintiff's evidence as to what happened:

First, that the plaintiff's intestate fell from the rear of a backing train upon the track; second, that plaintiff's intestate jumped from the rear of the backing train to the track, stumbled, fell, and was run over by the train. There is no proof whatever that there was any defect in the appliance used at the time, causing plaintiff's intestate to fall, nor is there any proof of any negligent movement or jerking of the train which precipitated him therefrom. The evidence, therefore, cannot support the first theory. Upon the other hand, if plaintiff's intestate, in the discharge of his duty, jumped from the moving train upon the track and lost his balance, then the undisputed evidence discloses that he did so in plain and express violation of orders and instructions given him by his superiors.

There is a suggestion that the cross-ties were piled too high on the car from which plaintiff's intestate jumped or fell, but the evidence further discloses that the cross-ties were not piled higher than usual. In any event plaintiff's intestate was first seen in the center of the track where it would be impossible for the engineer to have discovered his perilous situation.

In the final analysis, the evidence presents mere speculation and no more. "The rule is well settled that if there be no evidence or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue, or furnish more than material for mere conjecture, the court will not leave the issue to be passed on by the jury." *Seagrove v. Winston,* 167 N. C., 207; *S. v. Martin,* 191 N. C., 404. Referring to this rule in *Poovey v. Sugar Co.,* 191 N. C., 722, this Court says: "This rule is both just and sound. Any other interpretation of the law would unloose a jury to wander aimlessly in the fields of speculation."

We hold therefore that the motion for nonsuit, duly made by the defendant, should have been allowed.

Reversed.

C. M. REEVES AND J. C. WATKINS, TRADING AS REEVES & WATKINS, v. R. E. MARKS AND T. O. MARKS, COPARTNERS, TRADING AS MARKS BROS., AND S. A. MARKS.

(Filed 12 October, 1927.)

Costs—Stenographer's Fees—Reference—Evidence—Findings—Courts—Appeal and Error.

Where the losing party in the action moves the clerk of the court to recall execution under judgment on the ground of excessive cost taxed for stenographer's fees, it is required of him, upon reference made, to appear and show that the charge was excessive, and failing to appear and offer evidence, the referee's finding and approval of the court below will be sustained on appeal to the Supreme Court.

THIS was a motion made by defendants to recall execution which was issued in favor of Minnie Lee Hoover for $106.80, stenographer's fees taxed in the above-entitled cause against defendants. From LEE.

Hoyle & Hoyle for defendants.

PER CURIAM. The record shows that the matter was heard by consent. The court found that the $75 stenographer's fee taxed in the original cost was not returned on the execution by the sheriff as paid, but "stenographer $75" has the figure surrounded by a circle in lead pencil.

This ambiguity was explained by the clerk, who testified it was so marked as it had not been paid, and the judgment docket recites that all of the judgment has been satisfied in full "except $75 taxed as stenographer's fees." It is found as a fact that the stenographer's fees have never been paid and the defendants still owe same.

The facts further found are to the effect that the stenographer filed her bill later for $106.80; that objection was made by defendants' attorney; that the matter was referred to a referee, who gave notice to defendants' attorney of the time and place of hearing, but he did not appear. The referee found that the bill of $106.80 was correct. No exception was filed to the report of referee, although defendants' attorney had personal knowledge, and the report of the referee was confirmed by the judge who heard the original case and no appeal taken. The court below refused to recall the execution, and in this we find no error. The cases cited by defendants are not applicable.

Defendants contend that under the circumstances they were under no obligation to "hold a candle." We cannot so hold. Under the facts found by the court below, and there was some evidence to support them, it was incumbent on defendants to make objections and exceptions at the time and from adverse ruling appeal; otherwise, what rights defendants had, if any in the beginning, were waived. *Burroughs v. Umstead,* 193 N. C., p. 842. See *Bank v. Edwards, ante,* p. 308. The judgment below is

Affirmed.

J. L. HARTSFIELD v. CRAVEN COUNTY.

(Filed 12 October, 1927.)

1. **Taxation—Counties—Bonds—Necessary Expenses—Elections—Vote of People—Refunding Debt—Statutes.**

   Under the Municipal Finance Act (ch. 81, sec. 8(j), Public Laws of 1927), a county may fund an indebtedness incurred before its ratification for necessary expenses by the issuance of its bonds in anticipation of its receipt for taxes when authorized by statute, without submitting the question to the vote of its people.

2. **Same—Municipal Finance Act—Repealing Statutes.**

   The Municipal Finance Act, by express provisions, repeals a public-local law applied to a county when inconsistent with its terms.

3. **Same—Schools—Constitutional Law.**

   While bonds issued by a county for the maintenance or equipment of its public school houses are not issued for a necessary expense, Const. of N. C., Art. VII, sec. 7, they are valid when issued under the power conferred by statute when necessary to maintain the six months term of school made mandatory by our Constitution, and when issued in accordance with the statute authorizing it, the bonds are a valid indebtedness of the municipality without submitting the question of their issuance to the vote of the people.

4. **Same.**

   Where a county under power conferred by special statute has borrowed money from time to time for the maintenance and equipment of its public schools, its bonds to refund the indebtedness so incurred are valid if issued in conformity with the provisions of the general Municipal Finance Act, chapter 81, sec. 8(j), Public Laws of 1927.

5. **Statutes—Public Policy—Intent—Interpretation.**

   As a matter of public policy the general Municipal Finance Act should be liberally construed to effectuate its intent.

APPEAL by plaintiff from *Harris, J.,* at September Term, 1927, of CRAVEN. Affirmed.

Controversy without action, involving the validity of bonds authorized by the board of commissioners of Craven County, pursuant to the provisions of the County Finance Act.

From judgment upon facts agreed, plaintiff appealed to the Supreme Court.

Moore & Dunn for plaintiff.
R. E. Whitehurst for defendant.

CONNOR, J. The board of commissioners of Craven County, having complied with all the provisions of the County Finance Act, prescribed therein as preliminary to the issuance of the same, has authorized the issuance of bonds of said county, in the sum of $660,000 for the purpose of funding certain indebtedness of said county incurred before 1 July, 1927, and evidenced by notes of the county now outstanding. Public Laws 1927, ch. 81, sec. 8(j).

The said board was proceeding to offer said bonds for sale, when objection thereto was made by the plaintiff, a resident taxpayer and freeholder of said county, upon the ground that said bonds, if issued and sold as authorized, will be invalid as obligations of Craven County, for the reason that said board of commissioners is without lawful authority to issue and sell said bonds. Upon the facts agreed, the court was of opinion that the said board of commissioners is fully authorized by law to issue and sell said bonds, for the purposes recited in the orders providing for their issuance, and that said bonds, and all of them when issued and sold pursuant to law, will be valid obligations of Craven County. From judgment in accordance with this opinion plaintiff appealed to this Court.

The issuance of said bonds, in the aggregate sum of $660,000, was authorized by said board of commissioners, by two orders unanimously adopted at its meeting on 15 August, 1927, one of said orders providing for the issuance of bonds in the sum of $520,000, and the other for bonds in the sum of $140,000.

It is agreed "that Craven County has expended for legitimate governmental purposes the amount set out in the bond order authorizing the issuance of $520,000 bonds of the county of Craven for road, bridge and other purposes, and has received value for said amount, and there are now outstanding notes of said county, evidencing the amount so due, and the same are held by purchasers for value, said notes being issued for such necessary purposes in anticipation of the collection of taxes."

It is further agreed "that Craven County has expended the amount of $140,000 set out in the order authorizing the issuance of $140,000 bonds for the maintenance of six months school term, construction of school buildings and other purposes, said amount being approximately divided among such purposes as follows: $100,000 of said amount being expended for the construction and equipment of school buildings, after plans for such construction have been approved by the State Superintendent of Public Instruction, and that the remainder of said amount, to wit, $40,000 has been expended in the maintenance of the constitutional six months school term, and all of said debt existed prior to 7 March, 1927, and all of said notes were issued in anticipation of the collection of taxes."

It is provided in both said orders, authorizing the issuance of bonds in the aggregate sum of $660,000, that the proceeds of the same shall be applied solely to the funding of valid indebtedness of the county of Craven, incurred prior to 7 March, 1927, evidenced by notes of said county now outstanding, $520,000 of said indebtedness having been incurred for the construction and improvement of roads and bridges and other necessary county expenses, and $140,000 for the construction and improvement of school houses, and the maintenance of schools in Craven County for a term in each year of not less than six months.

It is further provided in said orders that each "shall take effect upon its passage and shall not be submitted to the voters of said county."

Plaintiff challenges the validity of all of said bonds upon the ground that they have not been approved by the vote of a majority of the qualified voters of Craven County; he contends that for this reason, by the express provisions of chapter 609, Public-Local Laws 1923, all of said bonds are invalid as obligations of Craven County. He contends, further, that if it shall be held that the provisions of said statute do not apply to the bonds in the sum of $520,000, for funding valid indebtedness of the county, incurred for necessary county expenses, they do apply to the bonds in the sum of $140,000 for funding indebtedness incurred for school purposes. This latter contention is upon the ground that such indebtedness was not for a necessary county expense and was incurred without express statutory authority.

Chapter 609, Public-Local Laws 1923, is entitled. "An Act Prohibiting the County Board of Education, or the Board of Commissioners for the County of Craven, or Board of Aldermen of the City of New Bern, said County, Pledging the Credit of said County or City, or Issuing Bonds of said County or City without first Submitting the Question to the Qualified Voters Thereof." The provisions of this statute, insofar as they would otherwise apply to the bonds which are the subject-matter of this controversy, are repealed by section 43 of chapter 81, Public Laws 1927 (The County Finance Act). It is therein provided, "that all acts and parts of acts, whether general, special, private or local, authorizing or limiting or prohibiting the issuance of bonds or other obligations of a county or counties are hereby repealed."

It may be doubted whether the provisions of said act relative to the submission of the question as to the issuance of bonds by the board of commissioners to the voters of the county, even if same had not been repealed, apply to the bonds in the sum of $520,000, authorized for funding indebtedness incurred for necessary county expenses. The last proviso in section one of said act is as follows: "*Provided further,* that nothing herein shall restrict or abrogate the right of the board of commissioners to contract or pay any indebtedness for necessary expenses, as provided by the general law." The County Finance Act expressly provides that bonds may be issued by any county for funding or refunding valid indebtedness of the county, incurred before 1 July, 1927, and that all indebtedness of the county, not evidenced by bonds, which was created for necessary expenses and which remains outstanding on 7 March, 1927, the date of its ratification, "is hereby validated." Chapter 81, sec. 8(j), Public Laws 1927. Orders authorizing the issuance of bonds for funding or refunding indebtedness, valid when incurred, or validated by the County Finance Act, need not be submitted to the voters of the county. Such orders are effective from the date of their adoption. Section 9(e).

The contention of plaintiff, certainly with respect to the bonds in the sum of $520,000, which the board of commissioners of Craven County has authorized, cannot be sustained. These bonds are valid, notwithstanding they have not been approved at an election held pursuant to the provisions of chapter 609, Public-Local Laws 1923, by a majority of the qualified voters of Craven County. The proceeds of the bonds will be applied solely to the funding of a valid indebtedness of said county. The total amount of such indebtedness will not be increased by the issuance of the bonds.

Plaintiff, however, earnestly contends that the expenditure by Craven County of the sum of $100,000 for the construction and equipment of school buildings, and of the sum of $40,000 for the maintenance of schools in said county, for a term of at least six months in each year, were not for necessary county expenses and were not authorized by statute; that, therefore, such expenditure, in the aggregate sum of $140,000, does not constitute a valid indebtedness of Craven County.

It must be conceded that the expenditure of $140,000, made by Craven County for the support and maintenance of public schools was not for a necessary county purpose, within the meaning of section 7, of Article VII of the Constitution. It was made, however, by Craven County in order to maintain in the several school districts in said county schools which were included within the uniform system of State schools, which the General Assembly is required by the Constitution to provide. *Frazier v. Comrs. of Guilford, ante,* 49. Such expenditure was not lawful, however, unless authorized by statute. *Tate v. Board of Education,* 192 N. C., 516. It does not constitute a valid indebtedness of Craven County, which may be funded by the issuance of bonds, under the County Finance Act, unless it was made by statutory authority.

Expenditures, now aggregating the sum of $140,000, have been made by Craven County, from year to year, for the purpose of maintaining and operating in said county public schools for a term in each year of not less than six months. These expenditures have been paid out of money borrowed from time to time by the board of commissioners of said county in anticipation of the collection of taxes, levied each year by the said board pursuant to statutes duly enacted by the General Assembly. Express authority was conferred by statutes upon the board of commissioners to borrow this money. It was contemplated that the money borrowed would be paid out of the taxes when collected. Deficits have, however, occurred from year to year, until now the total sum borrowed and not repaid is $140,000. The county's indebtedness in this sum is valid, because authorized by the General Assembly, and under the provisions of the County Finance Act may be funded by the issuance of bonds, without a submission of the question as to whether said bonds shall be issued to the voters of the county.

While the expense of maintaining schools included within the uniform system wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one, in a county, is not a necessary county expense, when the General Assembly has authorized and required a county as an administrative unit (see *Frazier v. Comrs., supra),* to incur indebtedness for that purpose, such indebtedness is a valid county indebtedness within the meaning of the County Finance Act. Bonds may be issued by a county under the provisions of the County Finance Act to fund such indebtedness.

Plaintiffs' contention that the bonds authorized by the board of commissioners of Craven County in the sum of $140,000 are invalid, for that such bonds have not been approved at an election by the majority of the qualified voters of the county is not sustained. These bonds when issued and sold pursuant to law will be valid obligations of Craven County. The total indebtedness of Craven County will not be increased thereby.

The purpose of the General Assembly in enacting the County Finance Act, as disclosed by a reading of all its provisions, is manifest. It was to enable the several counties of the State not only to provide for their future needs by issuing bonds for purposes specified therein, but also to fund their valid indebtedness heretofore incurred in good faith, by issuing bonds and thus relieve the taxpayers of burdensome annual taxation. The act should be so construed as to effectuate this purpose. A sound public policy forbids a narrow construction which would defeat the purpose of the General Assembly. By the terms of said act the counties have the power, when they comply with its provisions, to issue bonds to fund or refund valid indebtedness for money borrowed in good faith and expended for the public benefit, under authority of the General Assembly. The judgment is

Affirmed.

EASTERN BANKING AND TRUST COMPANY, AND E. L. MATTOCKS AND B. L. MATTOCKS, TRADING AS MAYSVILLE SUPPLY COMPANY, v. R. H. COLLINS, E. H. COLLINS AND MIRIAM C. COLLINS.

(Filed 12 October, 1927.)

Estoppel—Conduct—Equity—Evidence—Nonsuit—Husband and Wife.

Where the title to farming lands was in the mother who lived thereon with her husband and son, the son having the management of the farm, and the latter two have induced a mercantile firm with which they had been dealing for a long period of time, to become an accommodation indorser on the son's note to a bank, with the father also an indorser thereon: *Held*, in order for the mercantile firm to estop the mother in equity from claiming title to the land and denying liability, it is necessary for the mercantile company to show such further acts or conduct on the part of the mother as would make it unconscionable for her to now assert her title, and there being no sufficient evidence thereof, under the facts of this case, her motion as of nonsuit in the bank's action upon the note should have been sustained.

APPEAL by defendants from *Sinclair, J.*, at April Term, 1927, of ONSLOW. No error as to R. H. Collins and E. H. Collins. Judgment against Miriam C. Collins reversed.

This action was begun on 19 July, 1924, to recover judgment against defendants, R. H. Collins and E. H. Collins, on note for $1,520, due 3 October, 1923, and payable to plaintiff, Eastern Banking and Trust Company. The note was executed by R. H. Collins as maker, and was indorsed by defendant, E. H. Collins, and by plaintiffs, E. L. Mattocks and B. L. Mattocks, trading as Maysville Supply Company.

Plaintiffs further pray judgment that defendant, Miriam C. Collins, be estopped from asserting title to certain lands described in the complaint, situate in Onslow County, as against plaintiffs with respect to the judgment herein demanded against her codefendants, when same has been duly docketed.

From judgment on the verdict defendants appealed to the Supreme Court, assigning as error, chiefly, the refusal of their motion, made at the close of the evidence, for judgment as of nonsuit upon plaintiffs' cause of action against Miriam C. Collins.

I. M. Bailey, John D. Warlick and Varser, Lawrence, Proctor & McIntyre for plaintiffs.

Ward & Ward for defendants.

CONNOR, J. On 3 October, 1922, defendant, R. H. Collins, executed his note for $1,520, payable to plaintiff, Eastern Banking and Trust Company. This note was indorsed by his father, defendant E. H. Collins, and also by plaintiffs, E. L. Mattocks and B. L. Mattocks, trading as Maysville Supply Company. The note became due, according to its tenor, on 3 October, 1923. No payment has been made thereon. Defendants concede that both R. H. Collins and E. H. Collins are liable to plaintiff, Eastern Banking and Trust Company, on the note for the full amount thereof, with interest from maturity. Neither of the defendants assigns error in the judgment rendered on the verdict that plaintiffs recover of R. H. Collins and E. H. Collins, by reason of their liability on the note, the sum of $1,843.00, with interest on $1,520.00 at six per cent from 18 April, 1927. No exception appears in the record to the order made at July Term, 1926, making E. L. Mattocks and B. L. Mattocks, trading as Maysville Supply Company, parties plaintiff. Although liable to their coplaintiff as indorsers on the note, they were not made defendants at the time the action was begun. The judgment in favor of the plaintiffs and against the defendants, R. H. Collins and E. H. Collins, is affirmed.

The note upon which plaintiffs have recovered judgment against R. H. Collins and E. H. Collins is the last of a series of notes given in renewal, from time to time, of a note dated 4 February, 1920, to Eastern Banking and Trust Company. The original note was executed by R. H. Collins as maker, and was indorsed by E. L. Mattocks and B. L. Mattocks, trading as Maysville Supply Company, prior to its delivery to the payee. There is a controversy as to whether or not this note was also indorsed by E. L. Collins. His name appears on the back of the note. He denies that he wrote or authorized any one else to write his name thereon. He admits, however, that he indorsed each of the renewal notes, including the last note upon which the judgment, herein affirmed, has been rendered.

The defendant, Miriam C. Collins, is the wife of E. H. Collins and the mother of R. H. Collins, who at the date of the original note, was a minor. She is, and was at and prior to the date on which said note was indorsed by Maysville Supply Company, and on which the loan was made to R. H. Collins by Eastern Banking and Trust Company, the owner of certain lands described in the complaint, situate in Onslow County. She holds title to part of said lands under a deed to her from John C. Bell and wife, dated 8 December, 1897, recorded in the office of the register of deeds of Onslow County, in Book 64, at page 198; to part under deed to her from John C. Bell and wife, dated 23 September, 1910, recorded in the office of the register of deeds of Onslow County, in Book 105, at page 575, and to part under the will of John C. Bell, probated on 24 January, 1913, and recorded in the office of the clerk of the Superior Court of Onslow County, in Book of Wills No. 105, at page 52. Both the said deeds and the said will were promptly and properly recorded prior to the transactions alleged in the complaint, with respect to the indorsement of the note of R. H. Collins on 4 February, 1920, by Maysville Supply Company, and the loan of money to R. H. Collins by Eastern Banking and Trust Company.

At and prior to the date of these transactions defendants, E. H. Collins and Miriam C. Collins, as husband and wife, and defendant, R. H. Collins, their son, then a minor, lived together as a family on the lands owned by said Miriam C. Collins; during said time plaintiff, Maysville Supply Company, was engaged in a general mercantile business in the town of Maysville, Jones County, N. C., and plaintiff, Eastern Banking and Trust Company, was engaged in the banking business in said town. Defendants had many business transactions with both plaintiffs, involving the extension of credit by each of them to defendant, E. H. Collins.

Plaintiffs allege that during frequent conversations and transactions had with them by both E. H. Collins and Miriam C. Collins, the said Miriam C. Collins and the said E. H. Collins stated, in reference to the lands on which they and their son resided, that same was the property of E. H. Collins, and that he was conducting the farming operations on said land; that relying upon these statements made to them by both Miriam C. Collins and E. H. Collins, plaintiffs understood and believed, at the time the note of R. H. Collins, indorsed by E. H. Collins, was also indorsed by Maysville Supply Company and accepted by Eastern Banking and Trust Company, for a loan to R. H. Collins, that said lands were the property of E. H. Collins, and that all the defendants knew that plaintiffs had such understanding and belief, with reference to the title to said lands, and were acting upon the same in the indorsement of said note and in the acceptance of same for a loan to R. H. Collins. Defendants deny that they or either of them at any time made any representations to plaintiffs, or to either of them with respect to the title to the lands owned by Miriam C. Collins.

Plaintiffs rely upon the decision of this Court in *Shattuck v. Cauley,* 119 N. C., 292, as authority for their right to maintain this action and to recover judgment therein, as prayed, against the defendant, Miriam C. Collins.

The principles of law, which were applied to the facts in that case as found by the jury from the evidence offered at the trial, and upon which the judgment was affirmed, are well settled. They were stated and applied by *Rodman, J.,* in *Mason v. Williams,* 66 N. C., 564, and by *Shepherd, C. J.,* in *Morris v. Herndon,* 113 N. C., 236. Both these cases are cited with approval in *Bank v. Bank,* 138 N. C., 467. In his opinion in the last case *Hoke, J.,* says: "It is familiar learning that where one knowingly suffers another in his presence to purchase property in which he has a claim or title, which he wilfully conceals, he will be deemed under such circumstances to have waived his claim, and will not afterwards be permitted to assert it against the purchaser."

The principles upon which the doctrine of equitable estoppel is founded have been more frequently applied where the title to property, real or personal, has passed immediately, by sale or conveyance; they are likewise applicable, at least ordinarily, where credit has been extended upon the well-founded belief of the creditor that his debtor is the owner of specific property, subject to sale under execution on a judgment against him, which in truth and in fact is owned at the time by another, who prior to the extension of credit has represented to the creditor that the debtor is the owner of the property. In such case, where all the essential elements of an equitable estoppel are found to exist, it may well be held that the true owner is estopped from asserting his title as against the creditor who has reduced his debt to judgment. We need not discuss or decide upon this record whether or not a married woman, since the Martin Act (C. S., 2507) is subject to the doctrine of equitable estoppel with respect to her land, for manifestly, unless there is evidence from which the jury may find that she made the representations alleged as ground for an estoppel, the principles of the doctrine can have no application to her.

The only evidence offered at the trial of this case relied upon by plaintiffs as tending to show representations by Mrs. Collins to plaintiffs or either of them, with respect to the title to her lands, prior to the indorsement of the note of R. H. Collins, or to the loan to him of money thereon, is the testimony of plaintiff, E. L. Mattocks.

His testimony was to the effect that Mr. and Mrs. Collins had traded in the store of Maysville Supply Company for about twenty years, during which time they had resided on the lands described in the complaint, and conveyed or devised to her by John C. Bell; that sometimes they paid cash for merchandise purchased by them, and sometimes had same charged to E. H. Collins; that E. H. Collins conducted the farming operations on said lands; that in conversations with witness, sometimes in the presence of Mrs. Collins, Mr. Collins referred to said land as "our land," or as "our home place," and that Mrs. Collins made no protest to these references by her husband to her land; that she sometimes referred to her land as "our land" and "our home place." The witness further testified that E. H. Collins, in the presence of Mrs. Collins, asked if he would indorse the note of his son, R. H. Collins, who, he said, was going to get married and wanted to build a house on "our land"; that in consequence of this request he indorsed the note when same was presented to him by R. H. Collins, bearing the indorsement of E. H. Collins. There is no evidence that Mrs. Collins requested the plaintiff, Maysville Supply Company, to indorse her son's note, or that she requested its coplaintiff to make a loan to her son.

This evidence falls far short of showing conduct or representations, express or implied, on the part of Mrs. Collins upon which a jury might find that she is estopped from asserting title to lands owned by her under deeds and will, duly recorded. Defendant's assignment of error, based upon their exception to the refusal of the court, at the close of the evidence, to dismiss the action as to defendant, Miriam C. Collins, as upon nonsuit, is sustained.

There is evidence tending to show that the money loaned to R. H. Collins by Eastern Banking and Trust Company, upon the note indorsed by the Maysville Supply Company, was expended by him in the erection of a house on his mother's land. It is not contended by plaintiffs that they or either of them have a lien upon said land under the statute. C. S., 2434. Such contention could certainly not be sustained. The house was built in 1920; this action was begun in 1924.

The judgment as to R. H. Collins and E. H. Collins is affirmed. In their appeal we find

No error.

There is error in refusing to allow defendants' motion for judgment as of nonsuit as to Miriam C. Collins. The judgment as to her is

Reversed.

R. L. COBURN, RECEIVER OF MARTIN COUNTY SAVINGS AND TRUST COMPANY, v. C. D. CARSTARPHEN.

(Filed 12 October, 1927.)

Equity — Set-Off — Banks and Banking — Mutuality of Debts — County Funds—Debtor and Creditor.

While ordinarily the right of equitable set-off does not exist where there is a want of mutuality or the one claiming it has no right of action against the other in his own name, this principle is not applicable to county funds officially deposited in a bank since in a receiver's hands, and for which the depositor officially remains liable to the county, and he may offset his personal liability to the bank with the amount he may receive as a depositor of the county funds.

APPEAL by defendant from *Nunn, J.*, at June Term, 1927, of MARTIN. Affirmed in part and remanded.

From judgment on facts agreed defendant appealed to the Supreme Court.

B. A. Critcher and A. R. Dunning for plaintiff.
Wheeler Martin for defendant.

CONNOR, J. This action was heard upon a statement of facts agreed. They are as follows:

1. Plaintiff is the receiver of Martin County Savings and Trust Company, an insolvent corporation, which prior to his appointment as such receiver was engaged in the banking business at Williamston, Martin County, N. C. He has brought this action to recover of defendant the amount of his indebtedness to said corporation, as evidenced by two promissory notes.

2. Defendant, prior to its insolvency, executed and delivered to said corporation his two promissory notes, one in the sum of $300, and the other in the sum of $2,100. Both said notes came into the hands of the receiver as assets of said corporation. No payment has been made by defendant on said notes, or either of them, and both are now due.

3. On the date of its insolvency defendant had on deposit with said corporation, subject to his personal check, the sum of $50.23, The said sum is now due to defendant by said corporation.

4. Defendant is now, and was prior to the insolvency of said corporation, the treasurer of Martin County. As such treasurer he has executed and filed with said county a bond conditioned as required by statute. He is personally liable to the county for all moneys which have come into his hands belonging to said county, and which have not been lawfully paid out by him.

On the date of its adjudication as insolvent, defendant had on deposit with said corporation as treasurer the sum of $2,801.91. This deposit was made with moneys received by defendant as treasurer, belonging to Martin County. Defendant is personally liable to the county for said moneys. He is solvent. This sum is now due to defendant as treasurer by said corporation.

Upon the foregoing facts the court was of opinion that defendant was entitled to have the deposit in the sum of $50.23 applied as a credit upon his indebtedness to the corporation, as evidenced by his notes, but that he was not entitled to offset said indebtedness by the deposit in the sum of $2,801.91 standing on the books of the corporation to his credit as treasurer. From judgment in accordance with this opinion, defendant appealed to this Court. His only assignment of error is based upon his exception to the judgment.

It is conceded that there is no error in the judgment, applying the deposit in the sum of $50.23, as a payment on defendant's indebtedness to the bank. The judgment in that respect is in accord with well settled principles and is sustained by authoritative decisions of this Court. *Trust Co. v. Spencer,* 193 N. C., 745; *Graham v. Warehouse,* 189 N. C., 533; *Trust Co. v. Trust Co.,* 188 N. C., 766; *Moore v. Trust Co.,* 178 N. C., 128; *Moore v. Bank,* 173 N. C., 180; *Hodgin v. Bank,* 124 N. C., 540. Where a depositor is indebted to a bank and the debt is due, the bank has the right to apply the deposit as a payment, *pro tanto,* on the indebtedness. This right of set-off or counterclaim is mutual, and where the bank has become insolvent, and is in the hands of a receiver, the depositor is entitled to have his deposit applied as a payment on his indebtedness to the bank.

In *Dameron v. Carpenter,* 190 N. C., 595, *Varser, J.,* whose service as a member of this Court, although brief, was of great value both to his associates and to the people of this State, writing for the Court, says, with full citations supporting his statement of the law: "A set-off is in the nature of a payment or credit when the debts are mutual. Set-off exists in mutual debts, independent of the statute of set-off. Its flexible character is used in equity to prevent injustice." See *Williams v. Coleman,* 190 N. C., 368.

Defendant contends that there is error in the judgment with respect to the deposit in the sum of $2,801.91, standing on the books of the bank, at the date of its insolvency, to his credit as treasurer. The court was of opinion that defendant was not entitled to have his personal indebtedness to the bank deducted from the amount due by the bank to him as treasurer. The judgment was in accordance with this opinion. In this respect defendant contends that the judgment is erroneous.

As a general rule a bank may apply the amount due by the bank to its depositor as a payment on a debt of the depositor to the bank, at any time after the debt becomes due; this rule, however, applies only when the amount due as a deposit belongs to the depositor. It does not apply where the bank has knowledge that the money deposited belongs, not to the depositor, but to another, and was deposited in trust for the owner. 7 C. J., 653 and 658. The right of set-off arises and can be enforced only where there are mutual debts between the parties. The party invoking the right cannot maintain it, unless he could also maintain an action against the other party to recover the amount which he seeks to have allowed as a set-off or counterclaim. Thus in *Battle v. Thompson,* 65 N. C., 407, it was held that where defendant was indebted to the State of North Carolina, he could not in an action brought by the State Treasurer to recover upon such indebtedness, offer as a set-off or counterclaim the indebtedness of the State to him arising out of coupons of the State, which the State legally owed, for the reason that he could not maintain an action against the State.

The rule is not strictly applied, however, when either the bank or the depositor has become insolvent. Thus in *Davis v. Mfg. Co.,* 114 N. C., 321, it was held that an endorser on a note held by an insolvent bank against an insolvent principal, upon which the receiver had brought suit is entitled to avail himself of his claim against the bank, upon a certificate of deposit issued by the bank, and held by him at the date of the bank's insolvency. In *Trust Co. v. Spencer,* 193 N. C., 745, it was held by this Court that a bank, notwithstanding that it had taken a note signed by the directors of a corporation which had become insolvent, in payment of the corporation's note to it, retaining, however, the corporation's note as collateral security for the note of the directors, had a right to apply a deposit to the credit of the insolvent corporation as a payment on the indebtedness for which the bank held the directors' note.

In the instant case, although the deposit in the sum of $2,801.91 was made by defendant with moneys belonging to Martin County, and stands on the books of the bank in his name as treasurer, he is personally liable to the county for the moneys received by him as treasurer. He is solvent, and must account to the county for the amount of the deposit. As between the bank and the defendant, the bank is liable primarily to the defendant, and not to the county. His contention that upon the facts agreed he is entitled to have the amount of his indebtedness to the bank deducted from the amount due him by the bank must be sustained, not only upon principles of justice and equity, but also upon well supported authority.

In *Funk v. Young, Trustee* (Ark.), 210 S. W., 5 A. L. R., 79, it was held that the maker of a note to a bank, which thereafter became insolvent, may offset his indebtedness to the bank upon said note by a deposit in his name as trustee, where he was personally liable to his *cestui que trust* for the amount of the deposit. The facts in that case are almost identical with those in the instant case. The decision is well supported by authorities. In the opinion of the Court it is said: "The trend of all modern decisions is toward liberality in the allowance of set-offs in the case of insolvency of the party against whom the set-off is claimed to the end that only the true balance may be required to be paid by the representative of the estate of the insolvent." Many cases are cited in the note sustaining the decision. The just and equitable principles upon which the right of offset or counterclaim is enforced should be liberally applied to the end that a debtor to an insolvent corporation should not be required to pay his debt to the corporation, and also to pay the indebtedness of the corporation for which he is personally liable. The mutual liability should be so adjusted that the true balance may be ascertained and judgment rendered accordingly.

That the want of mutuality is not always permitted to defeat the right of set-off, see *People v. California Safe and Deposit Co.,* 141 Pac., 1181.

There is error in the judgment with respect to the deposit in the sum of $2,801.91. Defendant, because of his personal liability to the county for the amount of this deposit, is entitled to have his indebtedness to the bank, on his personal notes, deducted from the amount of the deposit. This will result in a judgment in favor of the defendant and against the receiver for the difference. The action is remanded in order that judgment may be entered in the Superior Court of Martin County in accordance with this opinion.

Affirmed in part and remanded.

J. D. BARNES v. PEOPLES BANK AND TRUST COMPANY.

(Filed 19 October, 1927.)

1. **Banks and Banking—Bills and Notes—Checks—Collection—Currency.**

A bank taking a check for collection is ordinarily required to accept therefor only money or currency in the usual and established methods among banks in such instances.

2. Same — Negligence — Clearing House — Customers — Knowledge and Consent of Depositors.

Where a depositor at a bank places therein a cashier's check of another bank for collection, and both the depositor and the bank knew that the payee bank could not pay it, and the collecting bank with the depositor's authority used the method of the clearing house in such instances in receiving a check for the amount, and proceeded with due diligence to collect it: *Held*, the bank of deposit for collection is not liable to its depositor as a matter of law for the nonpayment of the clearing house check it had thus received, it coming within the exception to the general rule of law.

3. Pleadings—Judgments—Admissions—Demurrer.

A judgment upon the pleadings on plaintiff's motion is in effect a demurrer to the answer, and every material allegation therein, and every reasonable inference therefrom, are considered on the motion as admitted.

APPEAL by defendant from *Harris, J.*, at the April Term, 1927, of JOHNSTON. Reversed.

Mrs. Barnes, the plaintiff, resides in Selma, and the defendant is engaged there in the business of banking. In her complaint she alleged that on 11 April, 1925, she deposited with the defendant a cashier's check issued to her by the First National Bank of Selma for $4,800, and that the defendant gave her a receipt or deposit slip for this sum; that on 5 May, 1925, she drew a check for this amount on the defendant in favor of O. P. Dickinson, who on the same day presented it to the defendant, by whom payment was refused, and that the check was then returned to her. She alleged that the defendant presented the cashier's check to the First National Bank of Selma and accepted in payment of this and other checks two drafts drawn on other banks by the First National Bank of Selma, aggregating $13,349.15 which, on or about 14 April, 1925, were returned to the defendant unpaid; that the defendant, without authority from her, failed to collect money on the cashier's check; negligently failed to exercise due diligence in making the collection, and that the defendant by reason of its default was indebted to her in the sum of $4,800 with interest.

In its answer the defendant denied some of the material allegations and alleged that it accepted the cashier's check for collection only; that it accepted from the First National Bank of Selma two checks or drafts on other banks, knowing it had not then in its banking house money enough to pay either of said checks; that the acceptance of such checks or drafts was the customary procedure which had been followed by both banks for many years in clearing their collections, and was generally observed; that when she received the cashier's check the plaintiff knew the First National Bank could not pay her in cash, and that the defendant received the check only for the purpose of collecting it in the method generally employed in these circumstances.

The trial judge gave judgment on the pleadings for the plaintiff's recovery of $4,800, less $468.85, with which her account had been credited, with interest and costs.

The defendant excepted and appealed.

O. P. Dickinson, Bryce Little, and Oliver G. Rand for plaintiff.
Ed. Ward and Abell & Shepard for defendant.

ADAMS, J. The plaintiff's motion for judgment on the pleadings was in the nature of a demurrer to the answer, admitting the truth of the allegations therein, but denying their legal sufficiency to constitute a defense. For this reason the answer should be liberally construed and every intendment should be taken against the plaintiff; or, conversely, to warrant the judgment the allegations which are essential as a basis for it should be admitted. *Pridgen v. Pridgen,* 190 N. C., 102; *Churchwell v. Trust Co.,* 181 N. C., 21; *Alston v. Hill,* 165 N. C., 255.

On 11 April, 1925, the defendant received from the plaintiff a cashier's check for $4,800, which had been given her by the First National Bank of Selma, and on the same day presented to the issuing bank this check and others held against it by the plaintiff's children, and accepted from it in substitution two drafts, one of which, covering the plaintiff's check, was drawn on the Federal Reserve Bank of Richmond, Virginia, for $12,847.15, and was afterwards returned unpaid. This was admitted.

It may be stated as a general rule that an agent for collection has no authority to receive payment in anything but money. In *Ward v. Smith,* 7 Wal., 447, 19 Law Ed., 207, it is said: "That the power of a collecting agent, by the general law, is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities." *Moye v. Cogdell,* 69 N. C., 93; *Bank v. Kenan,* 76 N. C., 340; *Bank v. Grimm,* 109 N. C., 93; *Bank v. Brightwell,* 71 A. S. R., 608; *Bank v. Bank,* 74 A. S. R., 527; *Minneapolis Co. v. Bank,* 77 A. S. R., 628; *Brown v. Bank,* 52 L. R. A. (N. S.), 652. In Michie's Banks and Banking, page 1395, the law is thus stated: "In the absence of special authority or well-established custom to the contrary, a bank with which paper is deposited for collection has no authority to accept anything but money as payment." Exceptions to the general rule are recognized also in *Malloy v. Federal Reserve Bank,* as reported in 281 Fed., 997, 1005, and in

264 U. S., 160, 68 Law Ed., 617. In the former this conclusion was announced: "The authorities appear to be practically uniform in holding that, in the absence of any instruction or permission from the owner of the check, or any custom brought to the notice of such owner to the contrary, the bank had no authority to accept or receive in payment of the check intrusted to it for collection anything other than money"; and in the latter, certainty and uniformity as essential qualities of such custom are clearly pointed out.

There can be no question that it was the defendant's duty to exercise due care to collect the plaintiff's check. 1 Morse on Banks and Banking, sec. 218; *Bank v. Kenan, supra.* But the defendant denied negligence and denied that it had acted without the plaintiff's authority. This in effect was an allegation that it exercised due care and had the plaintiff's assent to the course it pursued. More than this: it was alleged in the answer that the plaintiff, as well as the defendant, knew when the checks were presented to the First National Bank of Selma for collection that the bank did not have money enough to pay either of the checks; moreover, that the only way in which it could pay the plaintiff's check was by the usual method of clearing its collections. The object of these allegations, we take it, was to justify the defendant's acceptance of the checks as falling within exceptions to the general rule.

In giving judgment for the plaintiff upon the pleadings there was error.

Reversed.

GEORGE W. WILSON v. TILGHMAN LUMBER COMPANY.

(Filed 19 October, 1927.)

Negligence—Fires—Evidence—Conjecture—Nonsuit.

In order to recover damages to plaintiff's land against the defendant for the negligent setting out fire by the employees in taking up its tramway operated by steam locomotives, there must be evidence that will raise more than a conjecture that the fire that caused the damage was in some way attributable to the defendant, and it is *Held,* insufficient to be submitted to the jury upon the issue of negligence that the fire could have been started by an ignited stump, somewhere near or on the defendant's right of way, when it does not tend to show facts and circumstances that the defendant or its employees were reasonably responsible for the originating cause.

CIVIL ACTION before *Sinclair, J.,* at March Term, 1927, of SAMPSON.

This action was instituted by the plaintiff against the defendant for damages by reason of the burning of young growth on plaintiff's land, lightwood, straw, huckleberry bushes, rail fence, etc. At the conclusion of the evidence, and after one speech had been made to the jury by counsel for plaintiff, the trial judge directed the jury to answer the issues in favor of defendant.

From judgment rendered the plaintiff excepted and appealed.

H. E. Faison and P. D. Herring for plaintiff.
Fowler & Crumpler for defendant.

BROGDEN, J. The cause of action alleged by the plaintiff is as follows: "That thereafter, on Friday, the 20th day of April, 1923, the defendant company, by and through its agents and servants, after having cut over the lands and removed the timber therefrom, and while they were engaged in taking up and removing the iron rails and cross-ties from the roadbed, did negligently, carelessly and wrongfully permit fire to escape and get out from under control of its servants and employees and burned over a portion of plaintiff's said lands," etc.

A witness for plaintiff testified that there was a lightwood stump four or five feet from the railroad track which had been burning over near the end of the cross-ties, and that there were some "chunks" that looked like they had been burned. Witness said: "I passed there a day or two before and saw some hands pulling up the track and saw them loading T-irons. . . . They were taking up iron there Monday or Tuesday, and the fire was on Friday."

Another witness for plaintiff testified: "I was there on Wednesday before the fire started and saw the lightwood stump burning there. They were tearing up T-irons 100 yards from where the fire was and had torn it up where the fire was. . . . I saw the cars there on Wednesday. The cars were 20 yards to 150 yards from this stump. The stump was on fire Wednesday, and this fire started right around that stump. . . . The fire came from the railroad track which had been taken up a day or two before the fire."

Another witness testified: "The company was taking up the track at this place a day or two before the fire got out. They ran the train back and put the T-iron and cross-ties on it."

Plaintiff testified: "I saw the company's hands and agents taking up the track through the farm and down across the highway"; and, further, that after the fire he went to "a certain stump around which pieces of slabs lay, that had practically gone out, and the stump was burning some then. . . . They loaded the iron and cross-ties on a flat car which was pulled by an engine or locomotive."

The defendant offered no evidence.

The sole question to be determined is whether or not the trial judge was correct in directing a verdict in favor of the defendant.

It will be observed that the plaintiff does not allege that the defendant had any definite width of right of way or that the right of way was foul. It will be observed further that plaintiff alleges that on Friday, 20 April, 1923, the defendant negligently permitted "fire to escape and get out from under the control of its servants and employees and burned over a portion of said plaintiff's lands."

An analysis of the evidence discloses that on Wednesday morning a certain stump about five feet from the cross-ties of defendant's track was on fire. The track of defendant had been torn up at this point and the employees of the defendant were tearing up the track about 100 yards from the stump that was on fire. The cross-ties and T-irons were being loaded on cars pulled by an engine. There is no evidence that the engine had been within 100 yards of the burning stump. Indeed, it does not appear that the stump was not on fire before the engine arrived. There is no evidence that the engine was emitting sparks or putting out fire or that it was negligently operated or in defective condition. Reduced to final analysis, the plaintiff's evidence discloses that on Wednesday morning there was a burning stump within five feet of where defendant's track had formerly been located, and that at the same time there was an engine approximately 100 yards away, and that thereafter, to wit, on Friday fire apparently got out from this burning stump and damaged the land of the plaintiff.

The remarks of *Clark, C. J.,* in a concurring opinion in *Moore v. R. R.,* 173 N. C., p. 318, are pertinent to this case. The *Chief Justice* said: "While direct evidence that the fire was caused by the negligence of defendant is not required, but it may be inferred by the jury from the attendant circumstances, there must be more than bare evidence of a possibility, or even a probability, that the fire was so caused. As the counsel for the defendant well says, there must be more than the argument of solicitor, on one occasion: 'Gentlemen of the jury, there *was* a hog. *Here* is a negro. Take the case.'" So, in our case, it is not sufficient to show that here is a burning stump and yonder is an engine some distance away, without showing, at least, that the stump was not on fire before the engine arrived in the vicinity.

In *McBee v. R. R.,* 171 N. C., 111, this Court held that "mere proof of a foul right of way, without evidence that the fire was set out by a spark from a passing engine, is insufficient to establish actionable negligence. It has been repeatedly held that in addition to the foul condition of the defendant's right of way, plaintiff must prove that the fire was set out by the defendant in order to establish negligence." While, of course, the origin of a fire can be proved by circumstantial evidence, yet the circumstances must have sufficient probative force to justify a jury in finding that the fire originated from a spark or was otherwise set out by defendant's engine before the issue can be submitted. *McCoy v. R. R.*, 142 N. C., 384; *Maguire v. R. R.*, 154 N. C., 384; *Moore v. R. R.*, 173 N. C., 311; *Dickerson v. R. R.*, 190 N. C., 292.

Upon the allegations in the complaint and the proof adduced at the trial, we are of the opinion that the trial judge was justified in directing the verdict.

Affirmed.

STATE v. EMMERSEN O. ANDERSON.

(Filed 19 October, 1927.)

1. **Banks and Banking—Bills and Notes—Worthless Checks—Statutes—Partnership—Evidence—Instructions—Appeal and Error.**

Upon the trial under indictment for violating C. S., 4283, making it a misdemeanor to obtain property in return for a worthless check, etc., the evidence tended to show that the check in question was signed in the name of a certain cotton company by the defendant, and was conflicting as to whether the defendant was a member of the concern: *Held*, the question as to whether the defendant was a member of the company when he drew the check in question was not necessarily decisive of his guilt, and an instruction to find him guilty if the jury should find from the evidence he was not a partner, was reversible error.

2. **Same—Criminal Intent — Principal and Agent — Burden of Proof—Good Faith.**

The burden of proving the guilt of defendant in violating C. S., 4283, the worthless check statute, is on the State, and where the check in question has been signed by him in the name of a certain firm and there is evidence tending to show that other checks similarly signed had been paid, with further evidence that defendant's authority to sign such checks had been revoked, the burden of proving defendant's guilt is on the State, and raises the question as to the defendant's good faith for the jury to determine.

Appeal by defendant from *Parker, J.*, at August Term, 1927, of Halifax. New trial.

The defendant was indicted for violation of C. S., 4283, which makes it a misdemeanor to obtain property in return for a worthless check, draft, or order. The check for $25 was drawn on the Commercial and Farmers Bank of Enfield, and was signed "A. & W. Cotton Co., by E. O. Anderson." The defendant was convicted, and from the judgment he appealed, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Travis & Travis for defendant.

ADAMS, J. Whether the defendant was a member of the firm of the A. & W. Cotton Company was one of the controverted questions. He contended that he was; the State, that he was not. On this point the following instructions were given the jury: "If he signed the check as a partner of the A. & W. Cotton Company, and you should find that he was not a partner, then you should find him guilty. If he was a partner of the A. & W. Cotton Company, and had the right to sign checks, then he would be not guilty." Another question in dispute was that of the defendant's good faith in drawing the check. Among the canceled checks were about a dozen which had been signed "A. & W. Cotton Company, by E. O. Anderson." They had been paid, and this fact was material on the question of the defendant's intent, if he was not a partner in the business. There was evidence tending to show that his authority to sign checks had been revoked; but as the burden of proving the defendant's guilt was on the State the facts should have been submitted to the jury under appropriate instructions. Whether he was a partner would not necessarily determine the question of his guilt or innocence.

The instruction in reference to the partnership was excepted to; comment was also made on the failure of the judge to define the word "drawer" as applied to the check and to instruct the jury in relation to it; but as the case goes back for a new trial, these matters may be presented by relevant prayers for instructions.

New trial.

STATE v. ARCH JOHNSON.

(Filed 19 October, 1927.)

Criminal Law—Abandonment—Justification—Statutes—Adultery of Wife —Instructions.

While ordinarily the husband may not withdraw his support from his wife and children, and compel her to leave him without violating our criminal statute, C. S., 4447, it is one of the exceptions to the rule under which the husband may prove justification, when she has committed adultery with another man, and an instruction which deprives the husband of this defense is reversible error.

APPEAL by defendant from *Barnhill, J.,* at April Term, 1927, of HOKE.

Criminal prosecution tried upon a warrant charging the defendant with abandonment and nonsupport in violation of the provisions of C. S., 4447.

The prosecutrix and defendant were married in 1918 and lived together until 29 August, 1924, when they separated. It is the contention of the State that the prosecutrix was forced to leave the defendant's home, while the defendant contends that she left of her own volition.

It is also contended that the defendant has failed to support his wife in an adequate manner since their separation, but it is the position of the defendant that he is not liable therefor because of adultery on the part of the prosecutrix. The evidence with respect to the alleged infidelity of the wife is conflicting.

On the substance of the offense the court charged the jury as follows: "In that connection, gentlemen of the jury, if he sold out his household and kitchen furniture and told her he was going to live with her no longer, and she would have to go elsewhere to live, and in consequence of that she did go, then it would be an abandonment on his part, a withdrawal by him of the marital relation between them, such as would constitute an abandonment, and if thereafter he failed and refused wilfully and voluntarily to provide support for her, within his means, then he would be guilty as charged in the warrant under which he is being tried."

This instruction the defendant assigns as error.

The court further instructed the jury, to which the defendant excepts, that there was no evidence in the case to support the charge of adultery on the part of the prosecutrix.

From an adverse verdict and judgment pronounced thereon the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Roberson, Whitfield & Phipps and McLendon & Hedrick for defendant.

STACY, C. J., after stating the case: There is error in the instruction as to what constitutes an abandonment under the statute. "If any husband shall wilfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor." C. S., 4447. An offending husband may be convicted of abandonment and nonsupport when—and only when—two things are established: First, a wilful abandonment of the wife; and, second, a failure to provide "adequate support for such wife, and the children which he may have begotten upon her." *S. v. Toney,* 162 N. C., 635; *S. v. Hopkins,* 130 N. C., 647. The abandonment must be wilful, that is, without just cause, excuse or justification. *S. v. Smith,* 164 N. C., 475. And both ingredients of the crime must be alleged and proved. *S. v. May,* 132 N. C., 1021.

The instruction as given took away from the defendant the position of justification. *S. v. Falkner,* 182 N. C., 793. A lawful or justifiable abandonment on the part of a husband, although followed by wilful refusal or failure to provide adequate support for his wife and the children which he may have begotten upon her, is not the offense condemned by the statute. *S. v. Bell,* 184 N. C., 701.

There are other exceptions appearing on the record, worthy of consideration, but as the matters to which they are addressed are not likely to arise on another hearing, we shall not consider them now.

For error in the charge, as indicated, there must be a new trial; and it is so ordered.

New trial.

A. S. OLIVER ET AL. v. BOARD OF COMMISSIONERS OF JOHNSTON COUNTY AND STATE HIGHWAY COMMISSION.

(Filed 19 October, 1927.)

1. **Highways—Roads—County Commissioners — Correction of Minutes—State Highway Commission—Loans—Contracts.**

Where the county commissioners have exercised their statutory authority to loan county funds to the State Highway Commission, anticipating the allotment of State funds for the building of highways within the county, and have lawfully contracted for that purpose, it may not, after the passage of a later act, taking away this power, materially change the contract, but the county commissioners *nunc pro tunc* may correct the entries on their minutes theretofore duly passed and entered of record so as to make the entry speak the truth as to what had been regularly done, and to this end parol evidence is admissible, the time of the correction so made relating back to the time the entry should have been correctly made. C. S., 1310.

2. **Same—Petition of Taxpayers.**

Where the citizens and taxpayers have petitioned the county commissioners to issue county bonds and loan the proceeds to the State Highway Commission for the purpose of anticipating the State's allocation of funds to the county, wherein certain roads are designated, the county commissioners may disregard the roads designated in the petition and apply a part of the proceeds thus received to the building of certain other of the county roads found to be more necessary as links in the State system of highways, there being therein no element of contractual relations.

3. **Same—Necessaries—Vote of People—Elections—Constitutional Law.**

Where it is established that the building of certain highways in a county is necessary to connect up the State highway system, bonds therefor may be issued by the county without submitting the question to the vote of the people.

4. **Same—Contracts—Amendments—Public Benefit.**

Where a county has issued bonds to obtain money to lend to the State Highway Commission to expedite the building of necessary highways as links in the State system, to be repaid out of the allocation of the State funds, under a contract to do so, and thereafter have modified the contract so as to build at once two other certain highways that are necessary to be so built, and the interest of the holders of the county bonds is not affected: *Held,* the building of the two additional roads before the others will not be enjoined at the suit of the citizens and taxpayers upon the ground that the county commissioners were without power to so amend the original contract, it being both to the advantage of the county and its taxpayers as well as to the State.

5. **Pleadings—Evidence.**

Matters merely evidentiary upon the issues arising from the pleadings need not be alleged.

APPEAL by plaintiffs from *Harris, J.,* at April Term, 1927, of JOHNSTON. Affirmed.

The action was brought by the plaintiffs, citizens and taxpayers of Johnston County to annul a contract made between the defendants on 8 February, 1927, to restrain the defendants from carrying the contract into effect, and to require the board of commissioners to turn over to the State Sinking Fund Commission, under the provisions of chapter 95, Public Laws 1927, certain funds allocated to Johnston County by the State Highway Commission.

From the evidence introduced by the parties Judge Harris found the facts to be as follows:

1. That on 8 February, 1927, the board of county commissioners of Johnston County were the duly authorized and constituted authorities, having charge of the public roads and the building and maintenance thereof in Johnston County, and the power to make contracts relative thereto.

2. That the State Highway Commission were on 8 February, 1927, the duly authorized authorities, having charge of the State highways of the State of North Carolina, and the power to construct and maintain the same, and to make contracts relative thereto.

3. That the minutes of the board of county commissioners of Johnston County of 8 February, 1927, and those supplemental thereto, the same being the minutes of 16 February, 1927, and 21 April, together with the supplemental contract executed on 8 February, 1927, by C. A. Fitzgerald, chairman of the board of county commissioners of Johnston County and attested by Neil Barnes, clerk to the said board, constitute the supplemental contract and extension of time of repayment of the funds in the sum of $500,000 theretofore loaned to the State Highway Commission by the county of Johnston for the construction of State highways in Johnston County, and the court finds as a fact that the existing contract between the county of Johnston and the North Carolina State Highway Commission was duly made and entered into and the same became a binding and legal contract on 8 February, 1927; and the court further finds that the minutes of 15 February, 1927, and 21 April, 1927, were made *nunc pro tunc* to correct the minutes of 8 February, and that all of the said minutes relate back and become a part of the minutes of 8 February, 1927.

4. The court further finds that the supplemental contract of 8 February, 1927, is supplemental to and in extension and renewal of the contract of 14 April, 1925.

5. The court further finds that the State Highway Commission, through their counsel, have proposed to provide the funds for the payment of the $130,000 short-term note executed by the county of Johnston to procure funds for making the original loan to the North Carolina State Highway Commission; that this part of said loan will be due by the State to the county on maturity of said note.

It was thereupon adjudged that the prayer of the plaintiffs be denied; that the restraining order be dissolved, and that the contract made on 8 February, 1927, between the county of Johnston and the State Highway Commission be declared legal and valid. It was further adjudged by consent of parties that the Highway Commission should reserve out of the first money in its possession applicable to the discharge of the contract of 14 April, 1925, the sum of $130,000 and pay the same to the State Sinking Fund Commission in trust for the payment of the note of Johnston County for this sum, which is to mature 6 October, 1927. The plaintiffs excepted and appealed.

J. C. Clifford for plaintiffs.
Paul D. Grady and Abell & Shepard for Johnston County.
Assistant Attorney-General Ross for State Highway Commission.

ADAMS, J. The exceptions first to be considered are those which denounce the binding force of the contract made by the defendants on

8 February, 1927. Contracts of this character were authorized by the Act of 1921 (Laws 1921, ch. 2, sec. 14), but forbidden by the act of 1927. Public Laws 1927, ch. 95, sec. 12. The plaintiffs contend that the purported contract was made, not on 8 February, 1927, but some time after 4 March when the Act of 1927 went into effect, and as a basis of their contention they set forth these propositions: (1) That on 8 February no record of the contract was entered in the proceedings of the board of commissioners; (2) that the contract was made, if at all, in Wake County; (3) that the minutes of the board of commissioners were amended after the institution of the present action. The defendants not only deny that the contract was made outside Johnston County; they assert that it was duly considered and authorized by the board of commissioners in a meeting regularly held in the courthouse at Smithfield on 8 February, and that on 16 February in a meeting of the commissioners regularly called for the purpose it was ratified, affirmed, and ordered to be spread upon the minutes.

Among the facts found in reference to these contentions and made a part of the judgment are the following: The minutes of 8 February, 16 February, and 21 April, together with the agreement executed by the chairman of the board and attested by the clerk, constitute the supplemental contract between the defendants; the minutes of 16 February and 21 April were made *nunc pro tunc* to correct the minutes of 8 February; they relate back and are a part of the minutes entered of record at that time. It was found to be a fact that the minutes which were more fully set out after the institution of this action were "true minutes of what occurred on 8 February, 1927." The facts thus found are amply supported by the record. Indeed, the evidence to the contrary is very slight. So we are confronted with the question whether the defective or inaccurate minutes of 8 February could be made "to speak the truth" as to what actually took place.

On this point the law has been declared. In *Mayo v. Whitson,* 47 N. C., 231, *Nash, C. J.,* expressed the opinion of the Court in these words: "It is further urged that the Court will not allow an amendment of a record to the injury of third persons who have acquired an interest under it. The principle is misapplied here. The Court is not called on to amend any process whatever, but to amend its own records, so as to make them show the truth. The record so amended can work no greater injury to any one than would arise if the order had been committed to the records at the time it was made, for it must speak as of that time. The question we are now considering is one of great importance to every man. Every citizen is interested in the principle that the records of these courts of justice should import absolute verity.

The security of property and much of the peace of society depend upon it. As it is but the evidence of what has been transacted by the court, it should show the truth upon its face. To do this the court must see that nothing is put upon it not ordered by it, and nothing omitted which they have ordered." Of like import is *Foster v. Woodfin,* 65 N. C., 29: "Whenever, by any accident, there has been an omission by the proper officer to record any proceeding of a court of record, the court has the power, and it is its duty on the application of any person interested, to have such proceeding recorded as of its proper date. *Phillipse v. Higdon,* Bus., 380. Such an amendment differs materially from one for the purpose of putting into a process, pleading, or return, something which was not in it originally. An amendment for that purpose will not, in general, be allowed where the rights of third persons will be affected. But no subsequent dealings by third parties can impair the right of a party to have the record of a past proceeding made to speak the truth as to what was done. A court cannot admit that any one can acquire a legal right to perpetuate a falsehood on its records, whether it be one of assertion, or of omission only." And in *Hearne v. Comrs.,* 188 N. C., 45, *Hoke, C. J.,* writing the opinion, the Court said: "In the absence of some provision of law that in order to the validity of their action an order of a board of commissioners, or contract made by them, should be presently put upon the minutes or duly entered thereon, such an entry is not to be regarded as essential, and mere failure of the clerk of the board to keep the minutes properly is not a fatal defect. Under ordinary circumstances the minutes may be perfected by the proper officer *nunc pro tunc,* and when a contract or authority to make it is not otherwise required to be in writing, and in suits where the commissioners are parties, their action can be proved by parol and the minutes made to show the facts of the matter. *Charlotte v. Alexander,* 173 N. C., 515; *Houser v. Bonsal,* 149 N. C., 51. In *R. R. v. Reid,* 187 N. C., 320, to which we are cited by counsel, there was an effort to make substantial alterations of the minutes of the board of county commissioners in a suit between third parties, and holding that this could not be done except on application to the board to correct their minutes or in a suit where the said board being parties, were given opportunity to be heard and would be bound by the decree, the cause was remanded to the end that the commissioners be made parties. Here, however, the suit is against the commissioners, and the court has full jurisdiction to award relief and direct an amendment of the minutes so as to show what their action truly was. The court below, therefore, correctly ruled that parol evidence of the resolution of the commissioners touching this matter should be received and appellant's first exception is disallowed." See *R. R. v. Forbes,* 188 N. C., 151.

It is suggested in the appellants' brief that the resolutions setting out the complete proceedings of the board should not have been admitted in evidence because they had not been specifically pleaded in the answer. The pleadings sufficiently point out the necessity of correcting the minutes; but the resolutions offered by the defendants were evidentiary only, and evidence as a rule need not be pleaded. Apart from this, the plaintiffs' criticism is met by the Court's statement of the law in *Walton v. Pearson,* 85 N. C., 34, 48: "It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and without regard to its effect upon the rights of parties, or of third persons; and neither is it open to any other tribunal to call in question the propriety of its action or the verity of its records, as made. This power of a court to amend its records has been too often recognized by this Court, and its exercise commended, to require the citation of authorities—other than a few of the leading cases on the subject. See *Phillipse v. Higdon,* 44 N. C., 380; *Foster v. Woodfin,* 65 N. C., 29; *Mayo v. Whitson,* 47 N. C., 231; *Kirkland v. Mangum,* 50 N. C., 313." It was not only the privilege, it was the duty of the board of commissioners to see that their proceedings were accurately entered upon the minutes. C. S., 1310.

We concur in his Honor's conclusion that the contract between the defendants was executed on 8 February, 1927, and that its obligation was not impaired by the act which was ratified on 4 March. Indeed, the counsel for the appellants does not contend or intimate that this act is retroactive in its effect.

As another reason for not enforcing the contract the plaintiffs urge a resolution adopted by the commissioners of Johnston County on 6 April, 1925. In substance the resolution was as follows: Upon petitions presented it was ordered that bonds of Johnston County in the sum of $500,000 be sold and taken over by the State Highway Commission without interest in accordance with the contract between them, the terms of which were that the bonds were to be retired out of the county's pro rata part of the next bond issues to be made by the State for road purposes. The order was made on condition that if by Monday noon, 13 April, 1925, the petitioners supplemented the petitions theretofore filed with a sufficient number of qualified voters to total six thousand the order was to become absolute and the contract was to be executed. Pursuant to this resolution the defendants on 14 April, 1925, mutually executed a contract, by the terms of which the commissioners agreed to advance or lend to the State Highway Commission the sum of $500,000, and the commission agreed to refund without interest, "from issues of bonds for the construction of State highways that may be authorized by the next, any, or all subsequent General Assemblies, any and all sums requisitioned from and advanced or expended by the board under this contract in an amount not to exceed Johnston County's pro rata share of such bond issue or issues as hereinafter authorized by the General Assembly."

In the contract executed by the defendants on 8 February, 1927, the board of commissioners consented that any funds which the Highway Commission was obligated to repay under the first contract should be applied by the commission to the construction of two roads which the commission was to take over and include in the State highway system—one extending from Smithfield in the direction of Clinton to the Sampson County line, the other from route 22 northeast of Smithfield in the direction of Zebulon to the Wake County line. The commissioners waived any priority that Johnston County had under the terms of the first contract to the extent of the amount required to construct the two roads, not to exceed $500,000; and the commission accepted the roads for inclusion into the highway system and agreed to construct them as rapidly as practicable from funds which, except for the waiver referred to, would be available for repayment to Johnston County under the former contract.

The plaintiffs say that the contract of 8 February, 1927, is invalid, resting their argument chiefly on the order made by the commissioners on 6 April, 1925. They assert that in this order the board of commissioners agreed with certain citizens of Johnston County that the bonds issued in 1925 should be "retired out of Johnston County's pro rata part of the next bond issues made by the State for road purposes," and that approximately this sum now is or soon will be available for this purpose. It is obvious that this resolution did not create an enforceable contract between the board of commissioners and the six thousand petitioners therein referred to. The petitions are not set out in the record, but the recital in the resolution represents them as praying the commissioners to lend the State Highway Commission the sum of $500,000 "to be raised by a bond issue for the purpose of lending temporary aid" to the commission in constructing the proposed road. So far as the record discloses the petitions were silent as to the time the loan was to be refunded. They were in the nature of recommendations and were evidently understood and treated by the board. The order or resolution did not purport to be an agreement between the board and the petitioners and was wanting in the essential elements of a contract. If, notwithstanding the resolution, the commissioners had refused to make this contract with the Highway Commission, the petitioners could not have compelled its execution. In these circumstances the parties had as clear a legal right to modify their contract as they first had to make it. In the supplemental agreement the expediency, if not the necessity of the modification, is pointed out. It is there said that within the next two years approximately $500,000 will accrue to the credit of Johnston County out of the bond issue authorized by the General Assembly at its last session; that to have as much mileage as possible maintained by the State Highway Commission will be an advantage to the county; that the construction of the two roads to the Sampson and Wake lines is a public necessity; and that the interest of Johnston County, no less than public necessity, requires that these roads be constructed at the earliest possible date.

When the contract of 8 February was executed the supervision and control of the roads in Johnston County and responsibility for their construction and maintenance were committed to the board of commissioners. *Lassiter v. Comrs.,* 188 N. C., 379. If the contract had not been modified and the proposed roads had not been taken over by the Highway Commission the cost of their construction would have been a charge upon the county and a necessary expense not requiring the approval of a popular vote. It is apparent that the cost would be not less than the amount to be allocated to the county under the issues of bonds authorized. The bonds outstanding mature serially from 1932 to 1941; the bondholders therefore are not calling for their money. To what extent would the plaintiffs be profited if the board of commissioners should put into a sinking fund the amount allocated to the county and forthwith levy a tax for the purpose of raising a like sum with which to meet the "public necessity" of building the proposed roads? We are convinced that in consenting to a modification of the former contract the commissioners were not only within their legal rights, but according to the recitals in the later contract had in mind the single purpose of promoting the welfare of the county. In our opinion the judgment should be affirmed.

It may be noted in conclusion that all transactions of this kind entered into after 4 March, 1927, will be subject to the provisions of the recent act. Laws 1927, ch. 95.

Affirmed.

CITY OF WINSTON-SALEM v. LOTTIE WHITE ASHBY AND HUSBAND, J. P. ASHBY, ET AL.

(Filed 19 October, 1927.)

1. **Eminent Domain — Municipal Corporations — Cities and Towns — Statutes—Prerequisites—Streets and Sidewalks.**

   Under the provisions of our statute, C. S., 2792, before a city may take lands by condemnation to widen its streets it is necessary for it to allege and prove that it had first attempted to acquire them by purchase or negotiations from the owners.

2. **Same—Courts—Jurisdiction.**

   Section 2792 of the Consolidated Statutes requiring an attempt by a city to acquire lands of owners before proceeding to condemn the lands is jurisdictional.

3. **Statutes—In Pari Materia—Interpretation—Repugnancy.**

   3 C. S., 2792(b) amending the statute relating to the acquisition by a city of lands necessary for street purposes, in this case for widening its streets, should be construed *in pari materia*, with the other sections relating to the subject so as to reasonably harmonize them, and when so construed, the provision of this section is in harmony with that part of section 2792, requiring that before taking by condemnation the city must first endeavor to acquire the necessary lands by purchase or negotiation with the several owners. C. S., 1715.

4. **Pleadings—Answer—Demurrer—Admissions.**

   Where the complaint in condemnation proceedings of a city to acquire lands for street purposes alleges that it had previously and unsuccessfully attempted to acquire by purchase from or negotiation with the owners, the lands necessary for the purpose, and the answer makes allegation to the contrary, plaintiff's demurrer to the answer admits its truth for the purposes of the demurrer, rendering nugatory its allegations of previous unsuccessful attempt to acquire by purchase or negotiations.

APPEAL by Mrs. C. S. McArthur from *Harding, J.,* at March Term, 1927, of FORSYTH. Reversed.

This is a special proceeding instituted by the city of Winston-Salem against more than 500 defendants, including the defendant, Mrs. C. S. McArthur, for extension and widening of West Third Street, Burke Street, Brookstown Avenue, First Street and Shallowford Street, and creating an assessment district therefor.

The condemnation of the land involved would necessarily cause the destruction and removal of buildings situated where said streets are to be opened and widened, and dwelling-houses occupied by citizens of the city. There is situated in said assessment district the First Presbyterian Church of Winston-Salem, Brown Memorial Baptist Church, St. Leo's Catholic Church, West End Methodist Church, Calvary

Moravian Church, and one of the proposed new streets goes through the property of the Broad Street Primitive Church, taking the entire church.

Parrish & Deal for plaintiff.

Richmond Rucker, W. T. Wilson, Manly, Hendren & Womble, Ratcliff, Hudson & Ferrell and J. E. Alexander for defendant.

CLARKSON, J. The only question involved, necessary to be considered on this appeal: Must the plaintiff as a condition precedent attempt to acquire by purchase or negotiate with the owners of the land sought to be condemned? This necessitates the construction of the statutes relating to the query.

The plaintiff alleges in its complaint: "That the city has been unable to acquire title to said parcels of land which are needed for said improvement, for the reason that the defendants and the city have been unable to agree upon the purchase price, and for the further reason that some of the defendants are *minors,* and unable to make a valid agreement as to the sale of said lands, and that the petitioner is unable to acquire said lands except by this condemnation and assessment proceedings."

In answer the defendant says: "This defendant has not sufficient knowledge or information to form a belief and, therefore, denies the same. . . . And for a further defense to this action and bar thereto, this defendant says: That under the law of the State of North Carolina, and particularly under 2792 of the Consolidated Statutes of North Carolina, under which, as this defendant is advised, believes and alleges, the plaintiff is seeking to condemn the property of this defendant in this action, that the plaintiff has the power or authority to proceed to attempt to condemn the property of this defendant only in the event, if the governing body of said city are unable to agree with the owners thereof for the purchase of the land, privilege or easement attempted to be condemned; that no attempt or effort has been made by the city of Winston-Salem to purchase the said property of this defendant from her, or otherwise; nor has the plaintiff attempted or made an effort to agree with this defendant for the purchase of such land and the plaintiff is, therefore without authority to institute, prosecute or maintain this action for the condemnation of the lands of this defendant, or to recover therein, and this defendant, therefore, sets up and specifically pleads the same in bar of plaintiff's right of recovery in this action."

The plaintiff demurs to the answer as follows: "The plaintiff, the city of Winston-Salem, demurs to the further defense set out in the answer of Mrs. C. S. McArthur, for that the same does not in law constitute a defense to the special proceeding instituted by the plaintiff. The grounds for the plaintiff's demurrer to the defense set out in paragraph one of the further defense is that it was not necessary and it would not have been proper for the plaintiff to have negotiated with the defendants in this proceeding for the purpose of acquiring the property in question, or for the purpose of fixing the amount of assessments for benefits to be made against the said defendant or any of them; that chapter 220 of the Public Laws of 1923, provides an exclusive method whereby damages and benefits shall be determined by the commissioners appointed by the clerk, and on an appeal from them to a jury at term time, and it would, therefore, be unnecessary and improper for the plaintiff to attempt, by private agreement, to settle matters which by law have been placed in the jurisdiction of the court."

The plaintiff, in its petition, alleges that it has been unable to acquire title to the land needed, as it has been unable to agree with defendants upon the purchase price. The allegation in regard to minors need not be considered as the minors are under disability. The statute does not contemplate this useless formality. *Power Co. v. Moses,* 191 N. C., p. 744.

The defendant denies the allegation of the complaint, and as a bar to the proceeding sets up as a further defense and alleges as a fact that no attempt or effort was ever made by plaintiffs to acquire the land of defendant by agreement or negotiation. The plaintiff demurs to this further answer and the question for our determination is squarely presented.

This is a preliminary jurisdictional fact. *Power Co. v. Moses, supra.* The plaintiff so considered it when it filed the petition and alleged that it had not "been unable to agree upon the purchase price." On demurrer to the further answer the plaintiff now admits that no negotiations were ever had before the special proceeding was instituted. "A demurrer to an answer admits as true every material fact alleged in the answer to the same extent and with the same force as a demurrer to a complaint." *Real Estate Co. v. Fowler,* 191 N. C., 616. It is also universally held in this jurisdiction that a defendant by demurring admits as true every material fact alleged in the complaint properly pleaded." *S. v. Trust Co.,* 192 N. C., 246.

The plaintiff brings its special proceeding under the general State statutes.

Municipal Corporations, Art. XV, Part II, Power to Acquire Property. C. S., 2791, is as follows: "*Acquisition by purchase.* When in the opinion of the governing body of any city, or other board, commission, or department of the government of such city having and exercising or desiring to have and exercise the management and control of the streets, electric light, power, gas, sewerage or drainage systems, or other public utilities, parks, playgrounds, cemeteries, wharves, or markets, open-air or enclosed, which are or may by law be owned and operated or hereafter acquired by such city or by a separate association, corporation, or other organization on behalf and for the benefit of such city, any land, right of way, water right, privilege, or easement, either within or outside the city, shall be necessary for the purpose of opening, establishing, building, widening, extending, enlarging, maintaining, or operating any such streets, parks, playgrounds, cemetery, water, electric light, power, gas, sewerage or drainage systems, wharves, or other public utility so owned, operated, and maintained by or on behalf of any such city, such governing body, board, commission, or department of government of such city may purchase such land, right of way, water right, privilege or easement from the owner or owners thereof and pay such compensation therefor as may be agreed upon."

C. S., 2792, is as follows: "*By condemnation.* If such governing body, board, commission or department of the government of such city are unable to agree with the owners thereof for the purchase of such land, right of way, privilege, or easement, for the purposes mentioned in the preceding section (or for a site for city hall purposes, Public Laws 1923, ch. 181), condemnation of the same for such public use may be made in the same manner and under the same procedure as is provided in chapter Eminent Domain, Art. II; and the determination of the governing body, board, commission, or department of government of such city of the land necessary for such purpose shall be conclusive."

Chapter 220, Public Laws N. C., 1923, the material part:

"That section one, sub-chapter four, chapter one hundred and thirty-six, the Public Laws of one thousand nine hundred and seventeen, being sections twenty-seven hundred and ninety-one and twenty-seven hundred and ninety-two of the Consolidated Statutes, be amended by adding the following: (Section 1 not material.)

Sec. 2 (same as 3 C. S., 2792(b): "When it is proposed by any municipal corporation to condemn any land, rights, privileges or easements for the purpose of opening, extending, widening, altering or improving any street or alley, or changing or improving the channel of any branch or watercourse, for the purpose of improving the drainage conditions or the laying and construction of sanitary, storm, or trunk sewer lines in such municipality, an order or resolution of the governing body of the municipality at a regular or special meeting shall be made stating generally, or as nearly as may be, the nature of the proposed improvement for which the land is required, and shall lay out, constitute and create an assessment district extending in every direction to the limits of the area or zone of damage or special benefits to property resulting from said improvement, in the best judgment of said governing body. Said governing body shall cause such maps and surveys to be made showing the area of such assessment district and improvements proposed to be made, and of all the lands located in said assessment district, as it may deem necessary. The governing body shall appoint a time and place for its final determination thereof, and cause notice of such time and a brief description of such proposed improvement to be published in some newspaper published in said municipality for not less than ten days prior to said meeting. At said time and place said governing body shall hear such reasons as shall be given for or against the making of such improvement, and it may adjourn such hearing to a subsequent time."

The remainder of the act provides after final order for creating assessment district, the machinery, etc. See 3 C. S., 2792 "b" to "p," inclusive.

C. S., 2791 and 2792 are not repealed, but chapter 220, Public Laws N. C., 1923, *be amended* by adding to the sections *supra*. This clearly indicates that the attempt to acquire by purchase or negotiation requirement was not repealed. There is nothing in the amendment that is in conflict with negotiations and so repugnant that it cannot be reasonably reconciled. *Greensboro v. Guilford,* 191 N. C., p. 584; *Litchfield v. Roper,* 192 N. C., 202.

The section, C. S., 2792, provides for negotiation and can be reasonably reconciled with the amendment C. S., 2792(b). When it comes to *condemnation,* two methods are provided: (1) Under C. S., 2792 "condemnation of the same for such public use may be made in the same manner and under the same procedure as is provided in chapter Eminent Domain, Art. II." (2) Under C. S., 2792(b) the amendment "when it is proposed by any municipal corporation to condemn any land," etc., according to procedure set out. 3 C. S., 2792 "b" to "p," inclusive.

"Between the two acts there must be plain, unavoidable and irreconcilable repugnancy. It is apparent that there is not such a conflict and the two acts should be construed in *pari materia.*" *Greensboro v. Guilford, supra,* p. 589.

This construction harmonizes and gives vitality to so important a matter as negotiation before condemnation.

It may be noted that under C. S., Eminent Domain, Art. II, condemnation proceedings, sec. 1715, is as follows: "*Proceedings when parties cannot agree.* If any corporation, enumerated in section 1706 of this chapter, possessing by law the right of eminent domain in this State, is unable to agree for the purchase of any real estate required for purposes of its incorporation or for the purposes specified in this chapter, it shall have the right to acquire title to the same in the manner and by the special proceedings herein prescribed."

All the statutes, both public and private, so far examined, require negotiations before condemnation.

The principle applicable is well stated in 20 C. J., part sec. 317, p. 892-3, as follows: "*Attempt to agree with owner—a necessity.* Unless required by constitutional or statutory provision, an attempt to reach an agreement with the owner for a purchase of the land or of an easement in it is not a condition precedent to the institution of condemnation proceedings. But in some jurisdictions by express provision, either in the Constitution or by statute, and in some cases by both, proceedings to condemn property cannot be instituted unless such an attempt has been made. Such a provision is mandatory and not merely directory, and the condemnation proceedings are absolutely void in case no attempt is made before beginning them to come to an agreement with the owner." The following North Carolina cases are cited: *R. R. v. R. R.,* 148 N. C., 59, 73, 61 S. E., 683 (cit. Cyc.); *Hickory v. R. R.,* 137 N. C., 189, 49 S. E., 202; *Allen v. R. R.,* 102 N. C., 381, 9 S. E., 4. To which we add: *Hill v. Mining Co.,* 113 N. C., 259; *Durham v. Riggsbee,* 141 N. C., 128; *Greensboro v. Garrison,* 190 N. C., 577; *Power Co. v. Moses, supra.*

No doubt the reason the General Assembly of this State, in both private and public statutes, required negotiations before taking private property for public purposes was the due regard it had for the rights of landowners. The famous *Semayne case,* 5 Coke, 91 (1605), is the chief authority for the popular legal maxim, which says that every man's house is his castle. This doctrine since then has had considerable qualifications. Ordinarily, it is held in this jurisdiction that statutes that give the right to take private property for public purposes must be strictly construed and the property acquired only then by paying just compensation. It is not reasonable and right, no matter how important the undertaking, that a landowner or homeowner be brought into court without first negotiations looking to an amicable sale. In the present action it was stated on the argument of the case that the opening and widening of the streets contemplated would require an enormous outlay of money and a large number of dwelling-houses occupied by citizens would have to be destroyed or removed. In the zone one church, at least, would be entirely destroyed. In the assessment district is situated a Presbyterian, Baptist, Catholic, Methodist and Moravian church. It is but justice to those landowners who are in the wake of this improvement that they should not be forced into court without an effort first being made to purchase from them.

We think it unnecessary to consider the demurrer to the other defenses set up in the answer.

The demurrer to the answer as herein set forth is overruled.

Reversed.

STATE v. FLEET MELVIN.

(Filed 19 October, 1927.)

Evidence—Declarations—Contradiction—Instructions—Appeal and Error—New Trials—Criminal Law—Homicide.

Declarations of a witness made to another as to the facts in a criminal action for a homicide, are not admissible by the testimony of the one to whom they were made, unless the declarant's evidence or character has been in some way impeached on the stand, and then only to the extent they are not contradictory, and where contradictory as well as confirmatory evidence has been admitted by the trial judge upon exception of defendant, an instruction to the effect that the evidence should be considered only to the extent it corroborated the declarant's testimony, is reversible error.

CRIMINAL ACTION before *Sinclair, J.*, at May Term, 1927, of SAMPSON.

The defendant was charged with the murder of Pauline Owens, and was convicted of murder in the first degree. Sentence of death was imposed, and the defendant appealed.

The evidence tended to show that the defendant, a negro boy about 17 years old, had been going with the deceased, Pauline Owens, and that on the night of the homicide the deceased and another girl, named Mary Bradley, were going to a show; that the defendant was standing on the street when the deceased passed "and he told her not to go by him with her little head hoisted up." She told him to go on. Thereafter the deceased upbraided the defendant for "watching her," and the deceased said: "Fleet, you don't have anything to do but watch me. You can just let me alone and stop going with me." The defendant then "grabbed her, and she told him to turn her loose, and he threw her down on the ground. The deceased was killed almost instantly by a knife stab to the heart. Some of her fingers were almost severed."

The defendant contended that the killing was accidental; that he and the deceased were playing with the knife, and in struggling over it the deceased was cut.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

E. C. Robinson and Butler & Herring for defendant.

BROGDEN, J. Mary Bradley, a witness for the State, and the only eye witness to the killing, testified in part: "I did not see the defendant open his knife. I did not see the knife he had that night; he had her by the arm on the right side and was bending her back, but was not saying anything, and she was saying: 'Go on Fleet and let me alone,' and was crying. . . . They were holding hands after we crossed sidewalk; they came up holding hands. We all three were walking together on the sidewalk, and I was on Pauline's side; he was still holding her hand. I did not see the defendant open his knife; I didn't hear her say she was cut."

Dr. J. S. Brewer, another State's witness, was permitted to testify that Mary Bradley told him that she and the deceased had started to the show, and as they started down the street Fleet came out, and that he and Pauline had some conversation about "watching her," . . . and as they were crossing the street Fleet called to them, and Mary told her not to have anything to do with him, and to go on, . . . and as they came on to Dr. Brewer's house the argument seemed to get high, and that "Fleet jerked Pauline in the street and commenced jerking her and striking her, and that presently he got his knife and then she started away and heard Pauline call to her, and looking around Fleet had Pauline down on the ground next to my hedge, and just as she looked around Fleet got up and ran."

The defendant objected to the testimony of Dr. Brewer and moved to strike it out. Motion was overruled and defendant excepted.

The Solicitor stated to the court that the statement of Dr. Brewer that Mary Bradley told him "if he had come up a few minutes before he would have probably seen Fleet running," was not corroborative of the statement made by Mary Bradley, and asked that it be stricken out. This was done. The trial judge then stated to the jury that the evidence of Dr. Brewer was offered "only for the purpose of corroborating Mary Bradley. You will only consider that part of his evidence which you find tends to corroborate Mary Bradley, if you find any of it does, and you are not to consider any part of it that does not corroborate her."

A comparison of the testimony of the State's witnesses, Mary Bradley and Dr. Brewer, will disclose the following variations:

1. Mary Bradley did not say "the argument seemed to get high."

2. Mary Bradley did not say, "Fleet jerked Pauline in the street and commenced jerking her and striking her, and presently he got his knife."

This testimony of Dr. Brewer, therefore, contradicts the testimony of Mary Bradley, another State's witness, in material particulars which, if believed, totally destroyed the theory of the defendant that the cutting was accidentally done.

It has been the law from ancient times that the State could not impeach or discredit its own witness. It was first held in *S. v. Norris,* 2 N. C., 429, that in criminal actions the State could discredit its own witness, but in a note to that case *Battle, J.,* says it is not the law and calls attention to *Sawrey v. Murrell,* 2 Haywood, 397. The *Norris case* was expressly overruled in *S. v. Taylor,* 88 N. C., 694, in which the following utterance of Greenleaf, Vol. 1, sec. 442, was approved: "When a party offers a witness in proof of his cause, he thereby in general represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces, and having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence tending to show them unworthy of belief."

But it is contended that, although the evidence was contradictory, it was admitted only as corroborative of the testimony of Mary Bradley. The question then is, when may corroborative testimony be offered? *Reade, J.,* in *S. v. Parish,* 79 N. C., 610, states the rule thus: "The rule is, that when the witness is impeached—observe, when the *witness* is impeached—it is competent to support the *witness* by proving consistent statements at other times, just as a witness is supported by proving his character, but it must not be considered as substantive evidence of the truth of the *facts* any more than any other hearsay evidence. The fact that supporting a witness who testifies, does indirectly support the facts to which he testifies, does not alter the case. That is incidental. He is supported not by putting a prop under him, but by removing a burden from him, if any has been put upon him. How far proving consistent statements will do that must depend upon the circumstances of the case. It may amount to much or very little." The rule was further extended in *S. v. Maultsby,* 130 N. C., 664: "It was competent to corroborate the witness, whose credibility had been attacked by the course of the cross-examination, to show by his own testimony that soon after the occurrence and before this proceeding began he had made similar statements to his testimony on the stand." Again, in *S. v. Exum,* 138 N. C., 599, *Hoke, J.,* declares: "The courts of this country are not in accord as to the admission of this character of evidence—previous consistent statements to corroborate a witness who testified at a trial. Some of them reject such evidence altogether as unsound in principle and dangerous in practice. Some of those that admit the evidence have placed restrictions upon it, which we think go rather to its force than its competency; and the decisions of our own State have gone some further perhaps than the others in its admission. All the courts admitting such evidence are agreed that it is only competent as affecting the credibility of the witness, and is never used as substantive or independent supporting testimony; and further, that it is never admitted until the witness has been in some way impeached." Quoting from *Jones v. Jones,* 80 N. C., 246, the opinion proceeds: "The admissibility of previous correspondent accounts of the same transaction to confirm the testimony of an assailed witness, delivered on the trial, rests upon the obvious principle that as conflicting statements impair, so uniform and consistent statements sustain and strengthen his credit before the jury."

In *S. v. Bethea,* 186 N. C., 22, *Adams, J.,* said: "This Court has often held that whenever a witness has given evidence in a trial and his credibility is impugned, whether by proof of bad character or by his contradictory statements or by testimony contradicting him or by cross-examination tending to impeach his veracity or memory or by his relationship to the cause or to the party for whom he testified, it is permissible to corroborate and support his credibility by evidence tending to restore confidence in his veracity and in the truthfulness of his testimony. Such corroborating evidence may include previous statements, whether near or remote, and whether made pending the controversy or *ante litem motam.*"

It therefore appears from the decisions that the admissibility of previous statements made by a witness, as corroborating evidence, depends upon whether the witness has been impeached or his credibility impaired for any reason or on any account. In the event of impairment of credibility, previous similar statements are admissible, but the rule has never been expanded far enough to permit the introduction of previous contradictory statements, because in the very nature of things this would weaken credibility rather than strengthen or confirm it. In *S. v. Lassiter,* 191 N. C., 210, the Court says: "In no aspect of the law of evidence can contradictory evidence be used as corroborating, strengthening or confirming evidence."

Applying these principles to the present record, it is apparent that the narrative of Dr. Brewer, in the particulars mentioned, was not a narrative "of previous similar declarations" made by Mary Bradley, but rather of previous dissimilar and contradictory statements made by Mary Bradley as to how the killing occurred. This is not permitted under the rules of law applicable to the trial of criminal causes, and the defendant's exceptions are sustained.

New trial.

JESSE WALLACE v. R. E. BLAND AND WIFE, LOUISA BLAND.

(Filed 26 October, 1927.)

1. **Mortgages—Descriptions—Vagueness—Judgments—Foreclosure.**

   Where the defense to an action to foreclose a mortgage is that the mortgage is void for vagueness of description of the lands therein conveyed as security for the note therein specified, and reference is made to a suit pending in the court and county that will definitely locate the *locus in quo*, and the location of the lands by the terms of the mortgage is to be surveyed and set aside from a larger tract of definite description, and the said action has been finally decided and thereby the description of the mortgaged lands can be definitely ascertained, and this action is specifically referred to in the pleadings in the present action: *Held*, the mortgage is not invalid upon the grounds set up in defense, but enforceable, and a foreclosure sale according to its provisions is properly decreed.

2. **Same—Res Judicata—Estoppel.**

   Where the sufficiency of the description of lands conveyed by mortgage is made to depend upon a division thereof among tenants in common in adversary proceedings which have terminated by final judgment for a division of the lands, and the question of the sufficiency of the description has been affirmatively determined by one judge holding the term of court, excepted to and appealed from but the appeal not perfected, and the succeeding judge has also determined the sufficiency of the description: *Held*, the matter is not *res adjudicata*, or concluded by the former judgment.

3. **Same—Deeds and Conveyances—Contracts—Parol Agreement—Pleadings—Issues—Betterments.**

   Where the defendant mortgagors resist the foreclosure of a mortgage on their lands for invalidity on the grounds of vagueness of description of the lands so conveyed, and set up the further defense resting upon an agreement made by the parties involving claim for betterments, to which the statute of frauds is pleaded, nothing else appearing, no new issuable matters are raised, and it appearing that the mortgage was not void, the plaintiff in foreclosure is entitled to his relief.

APPEAL by defendants from *Sinclair, J.*, at February Term, 1927, of LENOIR. Affirmed.

Action to foreclose mortgage. From judgment on the pleadings defendants appealed to the Supreme Court.

Cowper, Whitaker & Allen for plaintiff.
Rouse & Rouse for defendants.

CONNOR, J. In their answer defendants admit the execution of the notes and mortgage, as alleged in the complaint. The notes are payable to plaintiff, and were executed by defendants in part payment of the purchase price of the land described in the mortgage, which was conveyed contemporaneously with the execution of the mortgage to defendants by plaintiff and his wife.

In defense of plaintiff's right to recover in this action, defendants allege in their answer that the description of the land contained in the mortgage is defective, and that therefore no land is conveyed thereby. The description as set out in the complaint is as follows: "A certain tract of land situate in Lenoir County, North Carolina, and more particularly bounded and described as follows: A certain portion of the Jesse Wallace tract of land containing 41 acres, which said 41 acres lies parallel with the northern boundary of the Louisa Bland tract of land. The northern boundary of said 41-acre tract lies between the old Grafton road and Neuse River. The said 41 acres is a portion of a certain tract of land deeded by Rebecca Depree to Jesse and Lizzie Wallace, dated 10 March, 1913, and recorded in Book 45, page 52, in the office of the register of deeds of Lenoir County.

"The above 41-acre tract is to be surveyed and cut off from the Jesse Wallace tract of land and is to be surveyed after the final settlement of a suit now pending in Lenoir County, entitled 'Jesse Wallace and wife and R. E. Bland and wife v. Q. A. Faulkner and wife.' "

The entire record in a special proceeding entitled "Jesse Wallace and wife and R. E. Bland and wife v. Q. A. Faulkner," lately pending in the Superior Court of Lenoir County, is specifically referred to and made a part of the pleadings. It appears that said proceeding has been finally settled and that the controversy with respect to the true dividing line involved in said proceedings has been determined (see *Bland et al. v. Faulkner, post,* 427, decided on appeal of plaintiffs therein, R. E. Bland and wife). There is no error in the opinion of Judge Sinclair that the description contained in the mortgage is not defective, and that the mortgage is not void because of defective description of the land conveyed thereby, as alleged by defendants. *Timber Co. v. Yarbrough,* 179 N. C., 335, and cases cited.

This contention was presented at November Term, 1924, of the Superior Court of Lenoir County by defendants, who then demurred *ore tenus* to the complaint; this demurrer was overruled by Judge Daniels, then presiding in said court, who, however, continued the motion of the plaintiff for judgment upon the pleadings until final settlement of the special proceeding, then pending, entitled "Bland *et al.* v. Faulkner." Defendants excepted to the judgment overruling their demurrer, but did not appeal therefrom. As both Judge Daniels and Judge Sinclair held that the description of the land contained in the mortgage was not defective, and that the mortgage was not void for that reason, as contended by defendants, it is not necessary to discuss or to decide plaintiff's contention that defendants were bound at the hearing before Judge Sinclair by the judgment of Judge Daniels, and that defendants' defense based upon their allegation that the mortgage was void for uncertainty of the description was *res adjudicata.* The question is discussed and the decisions of this Court reviewed by *Walker, J.,* in *Headman v. Comrs.,* 177 N. C., 261.

As a further defense to plaintiff's cause of action, set out in the complaint, defendants in their answer allege that after the execution of the deed, and of the notes and mortgage "it was covenanted and agreed between the plaintiff and the defendants and Q. A. Faulkner and wife that the lands involved in the suit referred to in the third paragraph of the complaint *(i. e.,* Bland *et al.* v. Faulkner), and forming a part of the attempted description of the lands embraced in the deed and mortgage referred to, should be sold for partition between the tenants in common therein interested in said suit pending in the Superior Court of Lenoir County, and that out of the proceeds of the sale of said lands the defendants should be reimbursed the amount and value of the improvements which had been placed thereon by defendants, which improvements defendants allege amount to $.........., and that the balance of the purchase money after deducting said improvements should be divided between the three tenants in common.

And the defendants further allege that by virtue of said contract and agreement so entered into between defendants and the plaintiff and his wife, to which Q. A. Faulkner and wife were parties, the said alleged indebtedness represented by the notes referred to in the second paragraph of the complaint, became thenceforth of no further force and of no binding effect upon the defendants, and that the said notes have no legal or binding effect upon the defendants, and the defendants are entitled to have the said notes and alleged mortgage surrendered up to them and marked "Satisfied, and the alleged mortgage canceled of record."

In his reply to defendants' answer, plaintiff denies that he entered into any agreement with defendants and Q. A. Faulkner with respect to the sale of the land which was the subject-matter of the special proceeding, as alleged in the answer, and further alleges "that any agreement entered into with reference to said land must have been in writing and signed by the parties to be charged therewith in accordance with the Statute of Frauds, and he now denies that any such written agreement exists or was ever made, and now pleads the Statute of Frauds in bar of defendants' attempt to set up any such agreement as is set out in their answer filed herein." Defendants filed no further pleadings, alleging that the agreement with respect to the sale of land involved in the special proceeding for partition was in writing.

The court was of opinion that defendants have not set up in their answer to the complaint any defense involving issuable facts which must be determined by a jury, and therefore rendered judgment upon the pleadings in favor of plaintiff and against defendants. In this opinion we concur. It appears from the pleadings that an actual partition of the land which, according to the alleged agreement was to be sold for division, has been made and confirmed. (See *Bland et al. v. Faulkner, post,* 427.) No sale could now be made in accordance with the alleged agreement. Defendants' purchase-money notes for the land conveyed by the mortgage have not been paid; according to their tenor default has been made, and the plaintiff is entitled to judgment on the notes and a decree of foreclosure of the mortgage. The judgment is

Affirmed.

MICHIGAN SANITARIUM AND BENEVOLENT ASSOCIATION v. MRS. W. P. NEAL.

(Filed 26 October, 1927.)

Actions—Damages—Parties — Physicians and Surgeons — Malpractice— Pleadings—Counterclaim—Parent and Child.

Where a mother has placed her son in a sanitarium for treatment and is personally responsible for the services therein rendered, in an action to recover therefor against her she may not qualify as guardian for her son and make herself a party for the purpose of recovering for him damages upon a counterclaim alleged to have been caused by malpractice, as such does not fall within the scope of the plaintiff's cause of action, and she in her capacity as guardian is not a necessary party; and *held further*, damages to herself by reason of the relationship are too speculative and remote as a basis of her recovery. C. S., 460, 456.

APPEALS by plaintiff and defendant, Mrs. W. P. Neal, from *Lyon, J.*, at August Term, 1927, of FRANKLIN.

Civil action, instituted 13 June, 1927, to recover $401.35, balance alleged to be due for medical attention and services rendered defendant's son while a patient in plaintiff's sanitarium from 16 April, 1925, to 8 June of the same year.

On 4 July, 1927, the defendant filed answer and alleged that, in sending her 27-year-old son, W. W. Neal, to plaintiff's sanitarium, she was acting "not only in her own behalf, but also for and in behalf of her said son"; that by reason of plaintiff's careless and negligent treatment her son, instead of being benefited, sustained, as a direct and proximate cause of such malpractice, a violent derangement of mind and temporary loss of sanity, from which the defendant suffered great mental anguish and lost, for a time, the "comfort, sustenance and filial support of her said son," endamaging the defendant to the amount of $25,000, which she sets up as a counterclaim; and that as she was appointed guardian of her said son on 11 October, 1925, the defendant asked that she as guardian and her son be made parties defendant to the present action. This motion was allowed, over objection of plaintiff, and following the order making additional parties, W. W. Neal and his mother as guardian came in and filed answer, denying plaintiff's right to recover, and set up a counterclaim for the negligence and malpractice as above mentioned, and further alleged that the said W. W. Neal was wrongfully and brutally assaulted while in plaintiff's sanitarium, endamaging said defendants in the sum of $50,000.

Plaintiff demurred to the counterclaim set up by the defendants, which was sustained as to the counterclaim set up by Mrs. Neal individually and overruled as to the counterclaim set up by W. W. Neal and his guardian. Plaintiff and defendant, Mrs. W. P. Neal, appeal, assigning errors.

Spruill & Spruill and G. M. Beam for plaintiff.

Yarborough & Yarborough, Ben T. Holden and Robert N. Simms for defendants.

PLAINTIFF'S APPEAL.

STACY, C. J., after stating the case: The motion of the defendant to have herself as guardian and her son made parties defendant in this action was for the evident purpose of setting up a counterclaim, and not because the presence of such parties was necessary to "a complete determination of the controversy" between the plaintiff and the defendant (C. S., 460), or essential to a "settlement of the questions involved." C. S., 456. No adjustment of the rights, as between the defendants, is demanded, and while the additional parties may be proper, they are not necessary to a complete determination of the controversy. *Spruill v. Bank,* 163 N. C., 43. Plaintiff has brought its action against Mrs. Neal alone, and upon the allegations of the complaint it must stand or fall. Therefore, the counterclaim set up in this action by W. W. Neal and his guardian should be stricken out. 24 R. C. L., 877. They were made parties only for the purpose of determining the controversy between the plaintiff and the original defendant. *Joyner v. Fiber Co.,* 178 N. C., 634; *Aiken v. Mfg. Co.,* 141 N. C., 339. The plaintiff has not elected to sue W. W. Neal, and no cause of action is set up as against him or his guardian.

It was held in *Coursen v. Hamlin,* 2 Duer (N. Y.), 513, that a counterclaim, which required the bringing in of other parties, could not be set up in the suit then pending. Note, 12 Am. Dec., p. 154. See, also, Note 10, A. L. R., 1252; *Utley v. Foy,* 70 N. C., 303; *Walton v. McKesson,* 64 N. C., 154; *Shell v. Aiken,* 155 N. C., 212, and *Engine Co. v. Paschal,* 151 N. C., 27.

The case is not like *Bowman v. Greensboro,* 190 N. C., 611, and *Guthrie v. Durham,* 168 N. C., 573, where questions of primary and secondary liability as between the defendants were presented. Nor is it one in which the rights of interveners are involved. *Sitterson v. Speller,* 190 N. C., 192; *Temple v. LaBerge,* 184 N. C., 252; *Feed Co. v. Feed Co.,* 182 N. C., 690; *Bank v. Furniture Co.,* 120 N. C., 477.

Error.

APPEAL OF DEFENDANT, MRS. W. P. NEAL.

STACY, C. J. The demurrer to the counterclaim set up by Mrs. Neal for mental anguish and loss of comfort, sustenance and filial support of her 27-year-old son was properly sustained under authority of the reasons employed in *Hinnant v. Power Co.,* 187 N. C., 288. These damages are too remote to be made the subject of an action on the allegations presently appearing of record. *Feneff v. R. R.,* 203 Mass., 278.

Affirmed.

F. J. GOODING ET UX. v. M. C. POPE ET AL.

(Filed 26 October, 1927.)

Evidence—Jury—Handwriting—Statutes.

Where payment of a note sued on is pleaded and the genuineness of the signature of the payee to a receipt for the amount is in dispute, and an expert in handwriting has given his opinion upon comparing with a

magnifying glass the disputed signature with the genuine one, it is not error for the trial judge to permit the jury, while deliberating upon their verdict, to make the comparison with the magnifying glass for themselves, when it does not appear that it could have been to the prejudice of the appellant. As to whether this is otherwise permitted under the provisions of C. S., 1784, *quere?*

APPEAL by defendants, M. C. Pope and wife, from *Bond, J.,* at May Term, 1927, of NEW HANOVER.

Civil action to recover the balance alleged to be due on a note and to restrain the cancellation of a mortgage given to secure the payment of the same.

On trial the whole case was made to turn on whether or not the defendants had paid to the plaintiff 14 August, 1926, the sum of $2,500 as a credit to be applied on said note. The defendants offered in evidence a paper-writing which purported to be a receipt, signed by the plaintiff, for $2,500, dated 14 August, 1926, also other papers bearing admittedly genuine signatures of the plaintiff, for the purpose of comparison. The controversy waged around the genuineness of this receipt. The jury found it to be spurious.

The papers offered in evidence by the defendants were handed to the jurors during the trial, and they examined same with a magnifying glass while counsel were arguing the case. After the jurors had retired to make up their verdict, they asked that the papers offered in evidence by the defendants, together with the magnifying glass, be sent to the jury room for further examination by them. Over objection of counsel for defendants the court directed the sheriff to deliver to the jury the papers offered in evidence by the defendants, together with the magnifying glass used on the trial. Defendants except and assign this action of the court as error.

Verdict and judgment for plaintiff. Defendants appeal.

McNorton & McIntire for plaintiffs.
W. F. Jones and Herbert McClammy for defendants.

STACY, C. J., after stating the case: Was it error for the court, after the jury had retired to make up its verdict, to send to the jury room, on request of the jury and over objection of counsel for defendants, the papers offered in evidence by the defendants, together with the magnifying glass used on the trial? We think not under the facts of the present case.

The practice at common law was against allowing the jury to examine the papers introduced in evidence, either during the trial or afterwards in the jury room. *Newton v. Newton,* 182 N. C., 54; *Tunstall v. Cobb,* 109 N. C., 321; *Outlaw v. Hurdle,* 46 N. C., 150. And this was the law of North Carolina prior to the passage of chapter 52, Public Laws 1913, now C. S., 1784, which is as follows:

"In all trials in this State, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

Following the enactment of this statute, it was said in *Newton v. Newton, supra,* that the admission of testimony as to the genuineness of a writing by comparison of handwriting is on the same basis as the declarations of agents. The court determines whether there is prima facie evidence of agency or of the genuineness of a writing or writings, admitted as a basis of comparison, and then the testimony of the witness and the writings themselves are submitted to the jury. This, however, does not necessarily mean that the jury shall take the writings into the jury room which, according to numerous decisions in other jurisdictions, is a matter resting in the sound discretion of the trial court. *Hopkins v. State,* 9 Okla. Crim., 104, reported in Ann. Cas., 1915 B., 736, with valuable note beginning on page 742; 16 R. C. L., 301. The use of a magnifying glass, with permission of the court, is also upheld in a number of cases. *Alexander v. Blackburn,* 178 Ind., 66; Note, Ann. Cas., 1915 B, p. 1092.

"Why a jury should not be allowed the use of means to aid them in the examination and comparison of handwriting submitted to them to be examined and compared, which have been found by the experience of bankers and business men of the highest utility for such purpose, we are unable to understand. There is no more mystery in such a glass than in ordinary spectacles in daily use. An unlearned man, other things being equal, can see through such glasses quite as well as the most learned." *Kannon v. Galloway,* 2 Baxt. (Tenn.), 230.

Without making definite decision on the subject or undertaking to lay down a rule to be followed generally, it is sufficient to say that, in the instant case, no possible harm has come to the defendants, as the jury was allowed to examine only the papers offered in evidence by the defendants, for the genuineness of which they vouched. In no event could the action of the court be held prejudicial to appellants.

No error.

MELISSA LEWIS ET AL. v. WILBUR LEWIS.

(Filed 26 October, 1927.)

Tenants in Common—Title—Sole Seizin—Adverse Possession—Burden of Proof—Instructions—Appeal and Error—New Trials.

Where sole seizin by sufficient adverse possession is pleaded in proceedings to divide lands among tenants in common, and the admissions make out a prima facie case of the tenancy, and the question as to the adverse possession is the only one involved upon the trial, the burden of proof is on the one setting up the defense, and an instruction otherwise is reversible error.

APPEAL by plaintiffs from *Cranmer, J.,* at June Term, 1927, of CARTERET. New trial.

Proceeding for partition of land among tenants in common, tried upon issue raised by defendant's plea of sole seizin. In his answer defendant alleges that he and those under whom he claims had been in the adverse possession of the land described in the pleadings for more than twenty years prior to the commencement of the proceeding.

The only issue submitted to the jury was answered as follows:

"Have the defendant Wilbur Lewis and those under whom he claims been in the adverse possession of the land described in the pleadings for twenty years prior to 1 September, 1926? Answer: Yes."

From judgment on the verdict plaintiffs appealed to the Supreme Court.

D. H. Willis and Moore & Dunn for plaintiffs.
Guion & Guion for defendant.

CONNOR, J. It is admitted in the pleadings that the land described therein was conveyed by James T. White to Fulford B. Lewis and Lemuel W. Lewis by deed dated 20 September, 1864, and duly recorded in Carteret County.

It is also admitted that plaintiffs are the widow and heirs at law of Lemuel W. Lewis, and claim under him an undivided one-half interest in the land. Defendant is the only heir at law of Fulford B. Lewis. He alleges that his father, Fulford B. Lewis, from 1864 to his death, and that he from his father's death to the commencement of this proceeding, on 1 September, 1926, had been in the actual, open, exclusive and notorious possession of the land, and that he is therefore now the sole owner thereof. There was conflicting evidence as to the facts involved in the allegations in the answer, upon which defendant bases his claim of sole seizin.

The court in its charge upon the only issue submitted instructed the jury as follows:

"The burden is upon the petitioner, Melissa Lewis, and her children to satisfy you by the greater weight of the evidence that he (defendant) has not been in possession of the land adversely for twenty years prior to 1 September, 1926."

Plaintiff's assignment of error, based upon their exception to this instruction, must be sustained.

Upon the admissions in the pleadings, nothing else appearing, plaintiffs and defendants were tenants in common of the land, as alleged in the petition. The only issue submitted to the jury arises upon the allegations in the answer, upon which defendant bases his plea of sole seizin. The burden was upon defendant upon this issue.

Lester v. Harwood, 173 N. C., 83, was a proceeding for the partition of land, in which defendants denied the allegation that plaintiffs and defendants were tenants in common. Defendants alleged sole seizin in themselves, claiming that they were owners of the land by adverse possession. It is there held that the burden of proof is upon the plaintiffs when sole seizin is pleaded to prove the tenancy in common, although it will devolve on the defendant to establish adverse possession after a prima facie case of a tenancy in common is made out.

In the instant case the facts which make out a tenancy in common prima facie are admitted. The only issue submitted involved defendant's allegation as to adverse possession. Upon this issue the burden of proof is upon the defendant.

For the error in the instruction as to the burden of proof upon the issue, plaintiffs are entitled to a

New trial.

HAMLET ICE COMPANY v. J. A. JONES CONSTRUCTION COMPANY ET AL.

(Filed 26 October, 1927.)

1. **Appeal and Error — Burden of Proof — Evidence — Questions and Answers.**

Where exception is taken to the judge's exclusion of evidence upon the trial, it is upon appellant to show error, and when the exception is taken to unanswered questions, the substance of the answers must be made to appear on appeal, so that the Supreme Court may pass upon its competency.

2. **Contracts—Building Contracts—Substantial Compliance — Burden of Proof.**

Where damages for a breach of a builder's contract are sought in an action, and the breach is denied, the burden of proof is on the plaintiff to show that the contract has not been substantially complied with by the defendant, under conflicting evidence.

APPEAL by plaintiff from *Devin, J.,* at February Term, 1927, of WAKE. No error.

Action to recover damages for breach of building contract; defendant denied the breach as alleged, and in its answer demanded judgment for the balance due on the contract price.

Issues submitted to the jury were answered as follows:

1. Did the defendant, J. A. Jones Construction Company, breach its contract with the plaintiff, as alleged in the complaint? Answer: No.

2. If so, what amount of damages did the plaintiff sustain on account of said breach? Answer: ....

3. What is the balance of the contract price, including extras, due the defendant by the plaintiff? Answer: $6,200.

From judgment on the verdict plaintiff appealed to the Supreme Court.

S. Brown Shepherd and J. W. Bailey for plaintiff.
Robt. N. Simms and Plummer Stewart for defendants.

CONNOR, J. Only assignments of error pertinent to the first issue submitted to and answered by the jury in the negative, need be considered upon plaintiff's appeal from the judgment in this action. If there is no error with respect to the first issue, manifestly it is immaterial whether or not there was error with respect to the second issue. There are no assignments of error in the record based upon exceptions to evidence or instructions relative to the third issue.

Defendant entered into a contract by which it agreed to construct for plaintiff, at Hamlet, N. C., an ice-storage plant, according to plans and specifications, all of which were in writing. Testimony of a witness, although an expert, as to general methods of designing and constructing cold-storage warehouses, as to whether the plans and specifications upon which defendant had agreed to construct the plant for plaintiff were of an approved and acceptable kind for the construction of cold-storage warehouses, and as to whether shavings used in the construction of the walls of the plant for insulation should be dry, and as to the effect of using wet shavings for that purpose, was properly excluded as evidence, upon defendant's objection.

Defendant promptly objected to questions addressed to the witness with respect to these matters. The record fails to disclose what the answers of the witness would have been had the objections been overruled. The competency of the testimony is not, therefore, presented by the assignments of error upon plaintiff's appeal. *Barbee v. Davis,* 187 N. C., 78, and cases cited.

With respect to the first issue the court instructed the jury as follows: "The burden of proof upon this issue is upon the plaintiff to satisfy you from the evidence, and by the greater weight thereof, that the defendant failed to comply with the terms of the contract in the erection of this building, as alleged in the complaint; that is, that he failed to substantially erect and build the building as the contract called for. That presents a question of fact, and the contract, specifications and blue prints, schedule of materials agreed upon between the parties have been submitted to you, together with the testimony of a large number of witnesses as to what was done, and as to the alleged failure of defendant to complete the building in accordance with the contract, and evidence on the other hand by the defendant that it was substantially erected and completed in accordance with the terms of the contract. It is a question of fact for you to determine."

Plaintiff excepted to this instruction, contending specifically that there was error in that the court in effect instructed the jury that there was no breach of the contract by defendant, if there was a substantial compliance with its terms. The assignment of error based upon this exception cannot be sustained. The instruction is in accord with the law as stated in the opinion of *Varser, J.,* in *Moss v. Knitting Mill,* 190 N. C., 644. We find

No error.

STATE v. E. Z. EUNICE.

(Filed 26 October, 1927.)

Criminal Law—Larceny—Instructions — Felonious Intent — Appeal and Error—New Trials.

Where the evidence is conflicting upon a trial for larceny, the burden of proof is on the State to show beyond a reasonable doubt the legal elements of the offense charged, and that it was done with a felonious intent, and an instruction which fails to so charge the law thereon is reversible error.

CRIMINAL ACTION, before *Sinclair, J.,* at March Term, 1927, of ONSLOW.

The defendant was indicted for the larceny of $31 in money from the prosecuting witness. The evidence tended to show that the defendant went to the house of the prosecuting witness to sell her a coat. She testified: "He kept wanting me to try the coat on. He pulled money out of my pocket and left . . . grabbed money out of pocket and left."

The defendant was convicted and sentenced to work six months on the public roads, from which judgment he appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Summersill & Summersill, Ward & Ward and G. V. Cowper for defendant.

BROGDEN, J. The chief exception is to the failure of his Honor to properly charge the jury. In the beginning of his charge the trial judge instructed the jury that: "In order to convict him the law places the burden on the State to satisfy you beyond a reasonable doubt that he is guilty as charged in the bill of indictment." The judge then proceeds to array fully the contentions of the State and the defendant, and concludes as follows: "You will take the case and consider it, consider all the evidence in the case, whether I have called it to your attention or not. You are sensible men. Take this evidence and weigh it, and say what weight you will give to each and every part of it, accepting that which you find entitled to be accepted and rejecting that which is not. If the State has carried the burden, which the law places upon it, and has satisfied you beyond a reasonable doubt that the defendant is guilty, as charged in the bill of indictment, your verdict would be guilty. If the State has not so satisfied you your verdict would be not guilty."

The specific exception addressed to the charge of the court is that the defendant was being tried upon an indictment for larceny and that the charge as given contained no definition of larceny or the legal elements which constitute the offense, and for the further reason that the question of felonious intent was not submitted to the jury.

In *S. v. Barrett,* 123 N. C., 753, the defendant was indicted for larceny. The court charged the jury as follows: "If you believe from the evidence that the prosecutor missed an axe, and if you should believe that the axe described by the witness, Shannon, as in the possession of the defendant, was that axe of prosecutor, and believe all this beyond a reasonable doubt, you will bring in a verdict of guilty, otherwise you will acquit the defendant." This Court awarded a new trial, declaring in the opinion: "The charge is fatally defective for the reason that it does not submit the question of felonious intent to the jury, which is one of the necessary ingredients of larceny." Again, in *S. v. Coy,* 119 N. C., 903, the Court said: "What is meant by felonious intent is a question for the court to explain to the jury, and whether it is present at any particular time is for the jury to say." *S. v. Kirkland,* 178 N. C., 810; *Blake v. Smith,* 163 N. C., 274.

Under the rules of law applicable the defendant is entitled to have his exception sustained.

New trial.

EMMA BARBEE ET AL. v. OSCAR THOMPSON ET AL.

(Filed 26 October, 1927.)

Wills—Devise—Fee Simple—Statutes—Presumptions—Intent.

Under the provisions of C. S., 4162, a devise of lands is presumed to be of the fee unless it may be sufficiently gathered from the other expressions of the will that the testator intended to pass an estate of less dignity, and *held,* a devise to testator's two daughters, B. and M., all of the testator's real estate after the death of his widow, and also to his daughter T. an equal life interest therein with B. and M., "or so long as the said T. may remain a widow." Upon the death of the testator's widow, B. and M. took in remainder a fee-simple estate, with the intent to provide for T., who remained unmarried and is now deceased, during her widowhood.

APPEAL by plaintiffs from *Midyette, J.,* at March Term, 1927, of DURHAM.

Special proceedings to partition lands alleged to be owned by the plaintiffs and defendants as tenants in common.

The defendant, O. D. Thompson, set up a plea of sole seizin, and from a judgment in his favor the plaintiffs appeal, assigning error.

R. O. Everett and R. M. Gantt for plaintiffs.
D. W. Sorrell and Fuller, Reade & Fuller for defendants.

STACY, C. J. On the hearing the legal question presented was properly made to depend upon the construction of the following provision in the will of John G. Thompson:

"*Item third.* After the death of my wife, Leana Thompson, I give and bequeath all my real estate to my daughters, Berthena Thompson and Martha H. Thompson. I also bequeath to my daughter, Tyrinda H. Fletcher, an equal life interest in my real estate with my daughters, Berthena Thompson and Martha H. Thompson, or so long as the said Tyrinda H. Fletcher may remain in widowhood."

It is agreed that if Berthena Thompson and Martha H. Thompson take a fee-simple estate in the real estate devised in Item 3 of the will of John G. Thompson, the defendant, O. D. Thompson, is now the sole owner of the lands described in the petition, but if Berthena and Martha H. Thompson take only a life estate under said devise, then it is agreed that the plaintiffs and said defendant are tenants in common and entitled to partition the lands in question.

His Honor correctly held that Berthena Thompson and Martha H. Thompson acquired a fee-simple estate in the lands devised in Item 3 above. The testator in undertaking to "bequeath" an interest in his real property to his married daughter, Tyrinda H. Fletcher (who died without having remarried), evidently intended to provide a home for her for life or during her widowhood. But no such limitation is annexed to the devise to Berthena Thompson and Martha H. Thompson, and there is nothing in the will to ascribe to the testator an intention to convey to them an estate of less dignity than a fee simple.

It is provided by C. S., 4162, that when real estate is devised to any person the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity.

The uniform holding, since the passage of this act in 1784, has been that an unrestricted devise of real estate passes the fee. *Roane v. Robinson,* 189 N. C., 628. In disposing of lands by will no words are required to enlarge a devise from one for life into one absolute or in fee. Indeed, it is generally necessary that restraining expressions be used to confine a devise to the life of the devisee. *Holt v. Holt,* 114 N. C., 242.

Affirmed.

BOARD OF COMMISSIONERS FOR THE COUNTY OF McDOWELL, STATE OF NORTH CAROLINA, v. ASSELL, GOETZ & MOERLEIN, INCORPORATED.

(Filed 26 October, 1927.)

1. **Taxation — Counties — Bonds — Municipal Finance Act — Statutes— Necessary Expenses—Constitutional Law — Elections — Vote of the People.**

Under legislative authority a county may issue bonds to refund its existing floating debt for the necessary county expenses as enumerated in Constitution of North Carolina, Art. VII, sec. 7, in excess of the 15 cents limitation upon the $100 valuation of its taxable property according to Art. V, sec. 6, of our Constitution, when coming within the provisions of the Municipal Finance Act, ch. 81, sec. 8, Public Laws of 1927. and where the record on appeal states that the issuance of the bonds is for necessary county purposes, and for taking care of its floating indebtedness, it will be assumed on appeal that the excess over the 15 cents valuation was for necessary county expenses, coming within the provisions of Constitution, Art. VII, sec. 7, not requiring the question of the issuance of the bonds to be submitted to the voters of the county.

2. **Statutes—Interpretation — In Pari Materia — Taxation — Counties—Bonds.**

A general act of the Legislature relating to the funding of a county indebtedness by the issuance of county bonds, and a public-local law relating especially to a county upon the same subject-matter passed at the same session of the Legislature, and both ratified on the same day, should be construed together as being *in pari materia.*

3. **Constitutional Law—Statutes—Interpretation—Courts.**

The courts will not declare a statute void as inhibited by the Constitution unless the violation of the Constitution is so manifest as to leave no room for a reasonable doubt.

4. **Taxation—Statutes—In Pari Materia—Constitutional Law—Municipal Finance Act—Public-Local Laws—Necessaries—Elections—Vote of the People.**

It is the declared purpose of the Municipal Finance Act to put the various counties of the State in a position to live within their incomes, and where a county has an existing floating indebtedness incurred for necessary county expenses prior to the date of its passage, and a special statute relating to a particular county alone is intended to be generally interpreted as prospective in its effect, but contains a provision by which a past valid indebtedness may be funded by it by the issuance of its bonds, and the general and local statutes have been passed at the same session of the Legislature and ratified on the same day: *Held,* construing the two statutes *in pari materia* when complied with, it is the legislative intent that the local statute does not take from the county the right to issue bonds for funding its past valid floating indebtedness, and where this expense has been incurred for necessary county expenses within the meaning of our Constitution, Art. VII, sec. 7, the question of the issuance of bonds is not required to be submitted to the voters of the county.

APPEAL by defendant from *Moore, J.,* at September Term, 1927, of McDOWELL. Affirmed.

This is a controversy without action. The facts agreed upon: "That prior to 7 March, 1927, the date upon which the County Finance Act (chapter 81, Public Laws of 1927), was ratified, there was an accumulated deficit in the General County Fund in McDowell County, North Carolina, in the form of floating indebtedness, in the sum of $50,000, all of which was incurred prior to the said date and was on and prior to that date a legal obligation, represented by certain contracts in the form of notes executed in the name of McDowell County, which notes were held by various banks and individuals, all of which indebtedness was created for necessary expenses of said county.

"That pursuant to the provisions of the said County Finance Act, at the regular May meeting, 1927, of the board of commissioners of the county of McDowell, an order was introduced looking to the permanent financing of the said floating indebtedness of the said county, notice of which order was published as provided by said chapter, and after publicly hearing and considering the order as introduced, to wit:

" 'It is ordered by the board of county commissioners of McDowell County, North Carolina:

" 'Section 1. That negotiable coupon bonds of McDowell County, North Carolina, be issued in the maximum principal amount of fifty thousand dollars ($50,000), to be known as "Funding Bonds," for the purpose of funding valid indebtedness for necessary expenses incurred before 1 July, 1927, and payable at time of passage of this order or within one year thereafter.

" 'Sec. 2. That a tax sufficient to pay the principal and the interest of the bonds when due shall be annually levied and collected.

" 'Sec. 3. That statement of the county debt has been filed with the clerk, pursuant to the County Finance Act, and is open to public inspection.

" 'Sec. 4. That this order shall take effect upon its passage, and shall not be submitted to the voters.'

"The same was read and, upon motion, unanimously passed by the affirmative vote of the members of the said board, and was so declared by the chairman of the said board at a special meeting of the said board held on 17 May, 1927, and thereupon the board passed a resolution authorizing the issuance of funding bonds pursuant to the provisions of the said County Finance Act, in the sum of $50,000, and advertised notice of the sale of said bonds to be held on Tuesday, 7 June, 1927, at which time the defendant, Assell, Goetz & Moerlein, Inc., became the highest and best bidder therefor, at the price of par and accrued interest, for bonds, properly and legally issued, bearing interest at the rate of four and three-quarters per cent per annum, payable semiannually, and maturing as set forth in said resolution, and its bid was unanimously accepted and the bonds ordered to be executed, issued and delivered to the purchaser, together with the approving opinion of a firm of attorneys agreed upon.

"That all matters and things required by the County Finance Act to be done, preliminary and leading up to the actual issuance of the said bonds, have been done and fully complied with, and the bonds as offered by the plaintiff to the defendant are in all respects in the form required by and in full compliance with the terms of the said act.

"That during the session of the North Carolina General Assembly of 1927, an act (chapter 532, Public-Local Laws 1927), entitled, 'An act to regulate issue of bonds in McDowell County,' was passed and ratified 7 March, 1927.

"That the necessary expenses of the county of McDowell, chargeable to the General County fund, for the fiscal year beginning 1 July, 1927, will require the levy of a tax to the constitutional limitation of fifteen cents on the hundred dollars valuation of property, or approximately that amount, making it impossible that the said accumulated deficit, as aforesaid, might be made up from a tax levy, and the funding of the said indebtedness or deficit by the issuance of funding bonds, under the provisions of the County Finance Act, is necessary, and the only avenue open to the board of commissioners for the county of McDowell, for making up such accumulated deficit, as required by the County Fiscal Control Act (chapter 146 of the Public-Local Laws of 1927).

"That upon the proceedings authorizing the issuance of the funding bonds being submitted to attorneys for their approving opinion, the questions were raised: (a) As to whether chapter 523, Public-Local Laws of 1927, prohibited the board of commissioners of McDowell County from issuing funding bonds under the terms of the County Finance Act (chapter 81, Public Laws 1927), without a vote of the people; and (b) as to whether the County Finance Act, authorizing the levy of a special tax under the provisions of section 8 of said act is in conflict with section 6, of Art. V, of the Constitution of North Carolina; that is, the question was raised as to the constitutionality of the provision of the County Finance Act relating to the issuance of funding bonds and the levy of a special tax therefor; and, thereupon, the defendant refused to take and pay for the said bonds in accord with its bid.

"That if the plaintiff is authorized and empowered to issue bonds under the County Finance Act, as aforesaid, the defendant stands ready, able and willing to take and pay for the same."

The court below held that the bonds "are valid and legal and are authorized by legal authority, and that the levy of the tax is not prohibited by the Constitution of North Carolina."

Pless, Winborne, Pless & Proctor for plaintiff.
Morgan & Ragland for defendant.

CLARKSON, J. The questions of law involved:

1. Whether or not, under Public Laws 1927, ch. 81, sec. 8, subsection (j) of the County Finance Act, bonds may be issued by the county commissioners to fund floating indebtedness of the county incurred before 1 July, 1927, for necessary expenses, which will require a tax levy in excess of 15 cents on the $100 valuation of property to pay such bonds.

2. Whether such bonds issued for such purpose, without a vote of the people, is prohibited by chapter 523, Public-Local Laws 1927, entitled "An Act to Regulate the Issuance of Bonds in McDowell County."

Subsection (j), *supra,* is as follows: "Funding or refunding of valid indebtedness incurred before first of July, one thousand nine hundred and twenty-seven, if such indebtedness be payable at the time of the passage of the order authorizing the bonds or be payable within one year thereafter, or, although payable more than one year thereafter, is to be canceled prior to its maturity and simultaneously with the issuance of the funding or refunding bonds, and all debt not evidenced by bonds which was created for necessary expenses of any county and which remains outstanding at the ratification of this act is hereby validated."

The agreed case shows that the $50,000 deficit was created for necessary expenses and a valid and legal obligation of the county incurred prior to 1 July, 1927. To fund this floating indebtedness by issuing bonds will require a tax levy in excess of 15 cents on the $100 value of property.

Const. of N. C., Art. V, sec. 6, is as follows: "The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: *Provided,* this limitation shall not apply to taxes levied for the maintenance of public schools of the State for the term required by article nine, section three, of the Constitution: *Provided further,* the State tax shall not exceed five cents on the one hundred dollars value of property."

In *Herring v. Dixon,* 122 N. C., at p. 424, the decisions are summed up as follows: "(1) For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission. (2) For necessary expenses, the county commissioners may exceed the constitutional limitation by special legislative authority without a vote of the people. Constitution, Art. V, sec. 6. (3) For other purposes than necessary expenses a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority. Constitution, Art. VII, sec. 7." *Tate v. Comrs.,* 122 N. C., 812; *Smathers v. Comrs.,* 125 N. C., at p. 488; *Henderson v. Wilmington,* 191 N. C., 269.

In *R. R. v. Cherokee County,* 177 N. C., 86, the language of the act in controversy "to provide for any deficiency in the necessary expenses and revenue of said respective counties." In *R. R. v. Comrs.,* 178 N. C., p. 449, the language of the act "to meet the current and necessary expenses of the county." *R. R. v. Reid,* 187 N. C., p. 320, approves a case cited, the language of the act of the case cited being "to supplement the general county fund."

The defendant cites some of the above cases to sustain its contention, that the agreed case shows that the proposed bond issue is intended to fund indebtedness created for necessary expenses of the county, and was an accumulated deficit in the general county fund in McDowell County. In other words, the indebtedness proposed to be funded was for ordinary expenses of the county or for necessary county purposes generally spoken of as *current expenses.*

The cases cited are to the effect that a county cannot go beyond the 15 cents on the $100 valuation of property for current expenses. There are other necessary expenses of a county other than *current,* such as roads, bridges, county buildings, county homes for the aged and infirm, etc. Under the Constitution a county can go beyond the limitation for such necessary expenses, "as they are a special purpose and with the special approval of the General Assembly which may be done by special or general act." ("j," *supra.)* The general act, subsection (j) says further, "Funding or refunding of valid indebtedness incurred before 1 July, 1927."

Under chapter 81, Laws 1927, sec. 2, the act defines "necessary expenses, means the necessary expenses referred to in section 7, Art. VII, of the Constitution of N. C." That section is as follows: "No county, city or town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." It will be seen that necessary expenses here referred to are not alone current or ordinary expenses of a county, but such as are classed as roads, bridges, etc. *R. R. v. Reid, supra; Storm v. Wrightsville Beach,* 189 N. C., 679.

The whole matter is carefully considered in *R. R. v. Reid, supra.* In that case the facts were disputed. The levy was 18 cents on the $100 valuation of property, 3 cents over. Defendant, sheriff and tax collector, when restraining order was sought by the railroad, contended and set up the fact that the 3 cents was for special necessary expenses, viz., constructing and maintaining bridges and maintaining the home for the aged and infirm. Although the minutes of the board showed a levy of 18 cents for the general county fund or current expenses, in fact only 15 cents was levied for that purpose and the additional 3 cents for the other necessary special purposes above mentioned. The case was reversed and remanded to the end that the board of commissioners be made parties, and if the minutes were incorrect, and corrected minutes would show that the 3 cents was not for special necessary purposes above mentioned, but the 18 cents was levied for general county purposes or current expenses, the order restraining the collection of the tax in excess of 15 cents should be made permanent.

In the present case the record does not disclose that the $50,000 indebtedness was for current or general county expenses. If it did the bonds to fund same would be invalid, as the levy for such purpose could not exceed, under the constitutional limitation, 15 cents on the $100 valuation of property. The record does show that the proposed bond issue was for necessary expenses of the county and a valid and legal obligation of the county. The subject or subjects of the necessary expense or expenses for special county purposes are not set forth, and nothing else appearing, it is taken for granted that they were for one or more special necessary purposes and funding permissible under Constitution, Art. V, sec. 6, and the County Finance Act. The special approval has been given by the general act.

In *Edwards v. Comrs.,* 183 N. C., at p. 60, it is said: "But the authorities apparently are uniform in holding that where there is no attempt to legalize prior litigation, or a prior invalid seizure or sale of property, or to interfere with vested rights, a statute enacted to confirm or validate a defective assessment of taxes is not in violation of the organic law, and is, therefore, effective for the purpose intended. This conclusion rests upon the recognized and accepted doctrine that a retrospective law, curing defects in acts that have been done, or authorizing or confirming the exercise of powers, is valid in those cases in which the Legislature originally had authority to confer the power or to authorize the act." *Construction Co. v. Brockenborough,* 187 N. C., 65; *Holton v. Mocksville,* 189 N. C., 144; *Storm v. Wrightsville Beach, supra.*

The latter part of "j," *supra,* says: "And all debt not evidenced by bonds which are created for necessary expenses of any county, and which remains outstanding at the ratification of this act is hereby validated."

Under the first proposition in controversy we think the tax can be levied and is valid and legal, and a vote of the people is not necessary.

The next proposition: The County Finance Act, ch. 81, Public Laws 1927, and the local act relating to bond issues in McDowell County, ch. 523, Public-Local Laws 1927, were ratified on the same day, 7 March, 1927. Considering them together, we are of the opinion that it was the intention of the General Assembly, and authority is hereby given the board of commissioners of McDowell County to issue bonds, without a vote of the people, to fund valid indebtedness of the county incurred before 1 July, 1927. The act for McDowell County is prospective, not retroactive. In fact it says: "That nothing in this act contained shall prevent the board of commissioners of McDowell County . . . from issuing bonds to refund maturing bonds heretofore issued and outstanding," etc.

"Every reasonable doubt is resolved against a retroactive operation of the statute." *Comrs. v. Blue,* 190 N. C., at p. 643.

The board of commissioners of McDowell County is attempting to put into effect the provisions of the County Fiscal Control Act (chapter 146, Public Laws 1927), and to wipe out deficits and make a new start, living within its income. The purpose of the act is set forth in section 24: "It is the purpose of this act to provide a uniform system for all counties of the State by which the fiscal affairs of counties and subdivisions thereof may be regulated, to the end that accumulated deficits may be made up and future deficits prevented, either under the provisions of this act or under the provisions of other laws authorizing the funding of debts and deficits, and to the end that every county in the State may balance its budget and carry out its functions without incurring deficits." The County Finance Act (chapter 81, Public Laws 1927) provides the machinery for funding or refunding valid indebtedness of counties incurred before 1 July, 1927.

The local McDowell County act is prospective, looking to the future, but providing for funding past valid indebtedness. The issuance of bonds in the future, with certain exceptions, are prohibited "unless and until the question of the issuance thereof is submitted to and authorized by a vote of the majority of the qualified voters of said county."

"All acts of the same session of the Legislature upon the same subject-matter are considered as one act, and must be construed together, under the doctrine of '*in pari materia.*'" *Wilson v. Jordan,* 124 N. C., at p. 687. It has been long settled that no court would declare a statute void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt. The philosophy of our system of government is based on the consent of the governed, subject to constitutional limitations.

Construing all the acts, both the public and private act for McDowell County together, a wise system is provided for issuing bonds to fund existing valid debts and throwing safeguards around future bond issues and preventing deficits. The purpose is laudable and requires counties to live within their incomes. See *Hartsfield v. Craven County, ante,* 358. The judgment below is

Affirmed.

JESSE W. HARDY AND WIFE, CORA L. HARDY, v. JOE W. FRYER ET AL.

(Filed 26 October, 1927.)

Deeds and Conveyances—Trusts—Mortgages—Priority of Liens—Title—Registration.

Where the grantee in a deed takes title in subordination to an existing unregistered mortgage on the lands, specifying the mortgagee with certainty, together with the fact that the title conveyed is subject thereto and the amount thereof in language that amounts to its ratification and adoption, and the deed is recorded, the grantee is deemed a trustee for the payment of the mortgage referred to and those claiming under his rights are bound by the trust created in the deed, and a later mortgage acquires only a secondary lien under a later but prior registered mortgage to that set out in the original conveyance.

CIVIL ACTION, before *Cranmer, J.,* at May Term, 1927, of PITT.

The plaintiff instituted this action against the defendant, Fryer, Farmville Building and Loan Association, Bank of Fountain, and all other lien holders, to restrain a sale of his property and to ascertain the amount and priority of liens thereon. The cause was referred to Hon. H. G. Connor as referee to find the facts and to state conclusions of law determining the rights of the parties. The referee heard the evidence and argument of counsel and filed an unusually clear-cut and comprehensive report.

The facts presenting the question of law involved are substantially as follows: On 16 October, 1920, J. T. Harris sold to plaintiff, Jesse W. Hardy and wife, a lot of land for $9,016.25 and executed and delivered a deed therefor. Contemporaneously therewith plaintiff, Hardy and wife, executed and delivered to the defendant, Farmville Building and Loan Association, a note for $3,500, secured by a mortgage upon the property conveyed, and also at the same time executed and delivered to the vendor, Harris, five notes aggregating $5,516.25, and securing same by a deed of trust. The deed from Harris, the vendor, to Hardy and wife, vendee, was immediately recorded. The mortgage from Hardy and wife to Harris, securing the said sum of $5,516.25, was duly recorded on 25 October, 1920, but the mortgage from Hardy and wife to the Building and Loan Association was not recorded until 8 February, 1923. Harris, the payee, in the notes aggregating $5,516.25, before maturity, transferred and delivered said notes to the Bank of Fountain, and the Bank of Fountain sold the notes to the defendant Fryer. The deed from Harris, the vendor, to Hardy and wife, vendees, dated 16 October, 1920, contained the following language: "Witnesseth, That in consideration of the sum of $5,000, and the assumption of payment of certain mortgage due the Building and Loan Association for $3,500, receipt of which is hereby acknowledged," etc. In the warranty clause of said deed the following language occurs: "That the same is free and clear of all encumbrances except mortgage to the Farmville Building and Loan Association, which is hereby assumed by the party of the second part, which assumption is a part of the purchase price hereof."

The Bank of Fountain contends that by reason of the fact that its mortgage, securing indebtedness of $5,516.25, was recorded prior to the recording of the $3,500 mortgage to the Building and Loan Association that its lien is superior to and prior to the $3,500 mortgage of the Building and Loan Association.

The Building and Loan Association contends that, while its mortgage for $3,500 was recorded subsequent to that held by the defendant bank and transferred to the defendant, Fryer, yet the notice and reference in the deed from Harris, the vendor, to Hardy and wife, the vendees, was sufficient to preserve its lien.

The referee, upon the facts found by him, concluded, as a matter of law, that the language contained in the deed "comes within the rule laid down by the Supreme Court in several cases, and that when Hardy assumed payment of the mortgage to the Building and Loan Association for $3,500, this assumption of payment passed along to all the persons dealing with the property thereafter."

The trial judge confirmed the report of the referee, and the defendants, Bank of Fountain and Joe W. Fryer, appealed.

John Hill Paylor for Farmville Building and Loan Association.

Skinner, Cooper & Whedbee, and Albion Dunn for Bank of Fountain and Joe W. Fryer.

BROGDEN, J. The question is this: Under what conditions will reference in a registered instrument, to a prior encumbrance unregistered, constitute a valid and enforceable lien by the holder of such prior unregistered encumbrance?

The principles deducible from our decisions upon the subject of the sufficiency of the references necessary to impart vitality to a prior unregistered encumbrance, may be stated as follows:

1. The creditor holding the prior unregistered encumbrance must be named and identified with certainty.

2. The property must be conveyed "subject to" or in subordination to such prior encumbrance.

3. The amount of such prior encumbrance must be definitely stated.

4. The reference to the prior unregistered encumbrance must amount to a ratification and adoption thereof.

The theory out of which these principles grow, is that the reference to the unregistered encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject thereto. *Hinton v. Leigh,* 102 N. C., 28; *Ward v. Anderson,* 111 N. C., 115; *Brassfield v. Powell,* 117 N. C., 141; *Bank v. Vass,* 130 N. C., 592; *Piano Co. v. Spruill,* 150 N. C., 168; *Blacknall v. Hancock,* 182 N. C., 369; *Bank v. Smith,* 186 N. C., 642; *Hardy v. Abdallah,* 192 N. C., 45.

Applying the tests specified to the case now under consideration, we are of the opinion that the references in the deed measure up to the standard prescribed by law. The creditor is identified, the amount and purpose of the debt stated, and the existence of a prior conveyance and agreement to assume the indebtedness fully and definitely disclosed.

The decisions in this State chiefly relied upon to sustain the contention of the defendants are *Piano Co. v. Spruill, supra,* and *Hardy v. Abdallah, supra.* The reference in the *Spruill case, supra,* was as follows: "One McPhail Piano, now in our possession, which is free and clear of all encumbrances except $115 now due the Piano Company." The court held this reference to be insufficient for the reason that the recital did not name the piano company, the creditor, nor state how or for what the $115 was due. The opinion states: "Here the mortgage to Spruill & Bro. does not recite any prior conveyance nor indicate that the mortgagees shall hold the property in trust to pay off such prior lien and apply only the surplus to their own debt." In the *Abdallah case, supra,* the only reference was in the warranty clause as follows: "Is free and clear of all encumbrance except one note for purchase money due in 1922." This reference did not identify the creditor nor state the amount of the supposed indebtedness, nor did it refer to any conveyance at all.

However, the defendant contends that the references which have been upheld by the court as imparting vitality to unregistered liens have all occurred in the identical paper held by the party endeavoring to exclude the prior encumbrance. And, therefore, as there is no reference in the mortgage which the defendant holds, but only a reference in the original deed of conveyance, the principles of law referred to do not apply. Now, it must be observed, in the outset, that the reference occurred in a conveyance which is an essential part of defendant's title. In other words, the validity of defendant's mortgage depends upon the validity of the deed from Harris to the plaintiffs, Hardy and wife. This deed is the foundation of defendant's chain of title so far as this controversy is concerned, and when the defendants took the notes aggregating $5,516.25, and the mortgage or deed of trust securing same, they were charged by law with full notice of the provisions of the deed upon which their security rested.

In this situation the defendants are met with the principle of law declared in *Holmes v. Holmes,* 86 N. C., 206: "And it is a well established rule, that where a purchaser in the necessary deduction of his title must use a deed which discloses an equitable title in another, he will be affected with notice, and will be bound by any trust that rested upon him from whom he purchased." *Manning, J.,* in *Thompson v. Power Co.,* 154 N. C., 22, states the same principle, quoting from 2 Pom. Eq. Juris. (3 ed.), sec. 626: "Wherever a purchaser holds under a conveyance and is obliged to make out his title through that deed, or through a series of prior deeds, the general rule is firmly established that he has constructive notice of every matter connected with or affecting the estate which appears, either by description of parties, by recital, by reference, or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title. The reasons for this doctrine are obvious and most convincing; in fact, there could be no security in land ownership unless it were strictly enforced."

Upon the law as written, we hold that the judgment of the referee, approved by the trial judge, was correct, and the same is

Affirmed.

J. L. ADCOCK ET AL. v. TOWN OF FUQUAY SPRINGS ET AL.

(Filed 26 October, 1927.)

1. **Taxation—Municipal Corporations—Cities and Towns—Bonds—Necessary Expenses—Ordinances—Statutes—Vote of People—Elections.**

While an incorporated city or town may issue bonds for a sewer and water system as a necessary expense, without submitting the question to its voters, it may nevertheless provide by an ordinance passed for the purpose that the bonds shall be so submitted, and then the proposed issue will require for their validity that the voters approve them at an election to be held accordingly, the ordinance in this respect having the force of a statute. 3 C. S., 2938(2)(3), 2948.

2. **Taxation—Elections—Municipal Elections—Statutes—Interpretation—Time for Holding Elections.**

For an incorporated city or town to issue valid bonds wherein it is required that its voters approve, it is made mandatory by statute, C. S., 2948(2), that the special election therefor be held at the regular municipal election next succeeding the passage of the ordinance, but not within one month before or after a regular election, and the term "general election" is interpreted with the antecedent words of the statute "municipal election," and excludes a general State or National election.

3. **Same—Calendar Month—Computation of Time.**

The requirement that municipal elections for the issuance of bonds shall not be held within one month before or after a regular municipal election, C. S., 2948, refers to a month according to the designation in the calendar without regard to the number of days it may contain (C. S., 3949(3), and is computed by excluding the first and including the last day thereof. C. S., 922.

APPEAL by plaintiffs from *Devin, J.,* at June Term, 1927, of WAKE. Reversed.

On 29 March, 1927, the board of commissioners of the town of Fuquay Springs passed two ordinances authorizing the issuance of bonds—the first in the sum of $90,000 for a water system, the second in the sum of $60,000 for a sewer system, each ordinance containing the proviso that it should take effect when approved by popular vote. The election was held and a majority of the votes were in favor of issuing the bonds. The plaintiffs, citizens and taxpayers of the town, brought suit to enjoin the sale of the bonds, setting up irregularities and statutory provisions which they alleged vitiated the election. On the return day the temporary restraining order was vacated and set aside, and the plaintiffs excepted and appealed.

W. B. Oliver and R. N. Simms for plaintiffs.
J. C. Little and R. Bruce Gunter for defendants.

ADAMS, J. The General Assembly may confer upon municipal corporations the power to create debts and issue bonds for necessary expenses without the approval of a majority of the qualified voters; but when it is provided by statute or ordinance that a proposition to incur the indebtedness shall be submitted to the voters their approval is necessary to a valid issuance of the bonds. *McKethan v. Comrs.,* 92 N. C., 243; *Swinson v. Mount Olive,* 147 N. C., 611; *Comrs. v. Webb,* 148 N. C., 120; *Ellison v. Williamston,* 152 N. C., 147. The cost of constructing water and sewer systems is one of the necessary expenses of a municipal corporation; but as the commissioners of Fuquay Springs deemed it advisable to obtain the assent of the voters it was essential to show at the hearing an "affirmative vote of the majority of the voters voting on the bond ordinance." This was done; so there is no dispute concerning the purpose for which the debt was to be contracted. 3 C. S., 2938(2), (3); 2948.

The appellants impeach the election on the ground that it was held without authority of law. The statute reads as follows: "Whenever the taking effect of an ordinance authorizing the issuance of bonds is dependent upon the approval of the ordinance by the voters of a municipality, the governing body may submit the ordinance to the voters at an election to be held not more than six months after the passage of the ordinance. The governing body may call a special election for that purpose or may submit the ordinance to the voters at the regular municipal election next succeeding the passage of the ordinance, but no such special election shall be held within one month before or after a regular election." C. S., 2948(2).

We deem it clear that the last two words, "regular election," relate to the antecedent "regular municipal election" and not, as contended by the appellees, to a general State and National election. This is the more reasonable, if not the only reasonable, interpretation of the statute. The regular municipal election was held on 7 May, 1927, and the special bond election on 7 June, 1927. The question is whether the latter election was held within one month after the former.

The word month shall be construed to be a calendar month, unless otherwise expressed. C. S., 3949(3). "The modern authorities, which are very numerous, recognize but two sorts of months, lunar and calendar. The lunar month, when spoken of in statutes, consists of twenty-eight days; a calendar month contains the number of days ascribed to it in the calendar, varying from twenty-eight to thirty-one." *S. v. Upchurch,* 72 N. C., 146. "A calendar month means a month as designated in the calendar without regard to the number of days it may contain; it is to be computed, not by counting days, but by looking at the calendar, and it runs from a given day in one month to a day of the corresponding number in the next month, except when the last month has not so many days, in which event it expires on the last day of that month." 38 Cyc., 312. In this respect our statute has adopted the computation of the civil instead of the common law. *Satterwhite v. Burwell,* 51 N. C., 92.

The time within which an act is to be done shall be computed by excluding the first and including the last day. C. S., 922. If 7 May be excluded the election of 7 June took place within a calendar month after the regular municipal election, because 7 June was the last day of the calendar month commencing after the expiration of 7 May. This is the law as expounded in *Burgess v. Burgess,* 117 N. C., 447, which was an action for the recovery of land. There the plaintiff had title in fee and the defendant held possession under the assignee of the bid offered by the board of county commissioners at a sale made by the sheriff for nonpayment of taxes. The statute under which the land was sold contained this provision: "At any time within one year after the expiration of one year from the date of sale of any real estate for taxes . . . the sheriff shall execute and deliver to the purchaser, his heirs or assigns, a deed of conveyance." Laws 1891, ch. 326 (not 323), sec. 66, p. 328. The Court gave the statute the following interpretation: "It is the general rule that when the computation of time is to be made from an act done, the day in which the act is done is to be excluded. *Jacob v. Graham,* 1 Black (Ind.), 393. The 3 May, 1892 (the date of the sale), would therefore be excluded, and the 3 May, 1893, included to complete the year. The 4 May, 1893, would be the first day after the expiration of the year. The same method of computing time within which an act is to be done is enacted in section 596 of The Code and decided in *Keeter v. R. R.,* 86 N. C., 346; *Barcroft v. Roberts,* 92 N. C., 249, and *Glanton v. Jacobs, ante,* 427. The deed, therefore, from Turner to the defendant was void, and the plaintiff ought to have recovered in the action." The decision clearly sustains the contention that the election of 7 June was held within a month after the regular municipal election.

The remaining question, whether the statute prohibiting an election within the prescribed time (C. S., 2948(2) is mandatory or directory, has been resolved against the position taken by the defendants. With respect to a special tax in special school districts a statute provided that no election for revoking such tax should be ordered and held in the district within less than two years from the date of the election at which the tax was voted and the district established. C. S., 5533. In *Weesner v. Davidson,* 182 N. C., 604, this inhibition was held to be mandatory, the Court observing, "The clear intent of the Legislature was to avoid the multiplicity and frequency of these elections, and we must give effect to each and every part of the statute." Authority to take one day from the time limit would in legal effect sanction the subtraction of any other number of days and would thereby practically nullify the statute and defeat the commendable purpose for which it was enacted.

The election of 7 June was void because it took place within a period during which the statute in express terms provided it should not be held. Judgment

Reversed.

R. E. BLAND AND WIFE, LOUISA BLAND, AND JESSE WALLACE AND WIFE, LIZZIE WALLACE, v. Q. A. FAULKNER.

(Filed 26 October, 1927.)

1. **Partition—Tenants in Common—Exceptions—Deeds and Conveyances—Estoppel.**

   Where the plaintiffs in proceedings to partition lands among tenants in common, except to the report of the commissioners appointed by the court raising an issue as to whether the lands were capable of an actual division or should be sold and the proceeds divided, the plaintiffs are estopped by a deed from one of them to the other conveying a part of the land allotted, from insisting upon their exceptions.

2. **Same—Interlocutory Orders—Questions of Law—Courts—Appeal and Error.**

   The question of whether the commissioners to sell lands in partition had correctly divided them, and also whether the lands were capable of an actual division, are matters of law for the court, upon facts found by him; and where the presiding judge has ordered an issue to be submitted to a jury at a subsequent term to ascertain the true dividing line between certain of the tenants, it is only an interlocutory order which may be disregarded by the judge holding the subsequent term as a matter still within the breast of the court, and does not involve the question as to whether an appeal will lie from one Superior Court judge to another.

3. **Same—Judgments—Modification—Rescission of Order.**

   Interlocutory orders not finally determining or adjudicating the rights of the parties, are under the control of the court and may be amended, modified, changed or rescinded upon good cause shown.

APPEAL by plaintiffs, R. E. Bland and wife, from *Sinclair, J.*, at February Term, 1927, of LENOIR. Affirmed.

This is a proceeding for partition of land situate in Lenoir County. Summons was issued on 8 January, 1919. The report of the commissioners making the partition was filed in the office of the clerk of the Superior Court on 10 March, 1919. Exceptions were filed to said report by plaintiffs on 19 March, 1919. On 24 March, 1925, an order was made by the clerk setting aside the report. Upon appeal from this order, heard at February Term, 1927, the order of the clerk was reversed, the exceptions overruled, and the report of the commissioners confirmed.

During the pendency of the proceedings, to wit, on 2 December, 1919, plaintiffs, Jesse Wallace and wife, conveyed by deed to their coplaintiffs, R. E. Bland and wife, a portion of the share of said land allotted to them in the report of the commissioners, then on file in the clerk's office, awaiting his action upon the exceptions thereto filed by plaintiffs. The deed conveying the land contains the following words with reference to the description: "The above 41-acre tract is to be surveyed and cut off from the Jesse Wallace tract of land and is to be surveyed after the final settlement of a suit now pending in Lenoir County, entitled 'Jesse Wallace and wife and R. E. Bland and wife v. Q. A. Faulkner and wife.'" The suit therein referred to is this special proceeding for partition.

At the time of the conveyance of said land R. E. Bland and wife executed their notes for part of the purchase price thereof, and conveyed said land to Jesse Wallace by mortgage deed to secure the payment of said notes. R. E. Bland and wife went into possession of said land under said deed soon after its date and have continued in such possession. On 24 March, 1925, Jesse Wallace and wife filed in this proceeding a paper-writing, called by them a Special Plea, wherein they withdrew their exceptions to the report of the commissioners and prayed that no further action be taken with reference to said exceptions. They alleged that their co-plaintiffs, R. E. Bland and wife, were estopped by their acceptance of the deed and their execution of the mortgage from further insisting upon their exceptions.

Upon the hearing of the appeal from the order of the clerk, setting aside the report of the commissioners on 24 March, 1925, at February Term, 1927, the court submitted an issue to the jury, which was answered as follows:

"What is the true dividing line between the lands of the parties hereto as tenants in common and the defendant, Q. A. Faulkner, individually? Answer: X to Z."

From judgment overruling all the exceptions to the report of the commissioners, confirming said report, and directing that the true dividing line as found by the jury be located by a surveyor, plaintiffs, R. E. Bland and wife, appealed to the Supreme Court.

Rouse & Rouse for plaintiffs R. E. Bland and wife.

Cowper, Whitaker & Allen for plaintiffs Jesse Wallace and wife.

F. E. Wallace, C. W. Pridgen, Jr., and Ward & Ward for defendant Q. A. Faulkner.

CONNOR, J. The controversy in this proceeding between the plaintiffs, on the one part, and the defendant on the other, originally, was as to whether there should be an actual partition of the land owned by them as tenants in common or a sale for division. The commissioners appointed by the clerk pursuant to his order made an actual partition, allotting to the parties to the proceeding their shares in said land, by metes and bounds, in severalty. Exceptions were filed to their report by the plaintiffs. Pending the hearing of these exceptions, and before any action by the court upon the report, plaintiffs, Jesse Wallace and his wife, who owned an undivided 4/7 interest in the land conveyed to their coplaintiffs, R. E. Bland and wife, who owned an undivided 1/7 interest, a portion of the share allotted to them in the report of the commissioners. The said report was thereafter set aside by the clerk, who in effect ordered that the land be sold for division. The appeal from the order of the clerk came on for hearing before Barnhill, J., at December Term, 1925, of the Superior Court of Lenoir County. Judge Barnhill, upon consideration of the exceptions filed by plaintiffs to the report of the commissioners, made an order directing that certain issues, or more properly speaking, certain questions of fact, should be submitted to a jury at a subsequent term of said court. He thereupon continued the hearing. When the proceeding came on for hearing before Sinclair, J., at February Term, 1927, Judge Sinclair was of the opinion that upon the then state of the record, it was not necessary to submit to a jury the issues as directed by Judge Barnhill at the previous term. He declined to submit said issues, but did submit the issue as set out in the record. Plaintiffs, R. E. Bland and wife, excepted to the action of Judge Sinclair in refusing to submit the issues as directed by Judge Barnhill, and assign same as error.

This assignment of error is not sustained. The order of Judge Barnhill was merely interlocutory. The issues which he directed to be submitted to a jury were not raised by the pleadings, and involved matters which could have been and are usually determined by the judge. His order did not determine or adjudicate any rights of the parties. Interlocutory orders, not finally determining or adjudicating rights of the parties, are always under the control of the court, and upon good cause shown they can be amended, modified, changed or rescinded as the court may think proper. *Maxwell v. Blair,* 95 N. C., 318, and cases cited. The principle that no appeal lies from one judge of the Superior Court to another (see *Dockery v. Fairbanks-Morse Company,* 172 N. C., 529) has no application to a mere interlocutory order. The fact that Judge Barnhill, under our rotating system, was succeeded by Judge Sinclair as the judge of the Superior Court holding the courts of Lenoir County, did not deprive the court of power to modify or rescind the order. No rights of appellants have been affected by Judge Sinclair's action which they assign as error.

The exceptions to the report of the commissioners were filed by plaintiffs jointly on 19 March, 1919. They thereby joined in the contention that the land was not susceptible of actual partition, but should be sold for division. Plaintiffs, R. E. Bland and wife, further excepted for that the share allotted to them by the commissioners was not worth one-seventh of the value of the entire tract, their undivided interest being one-seventh. Subsequent to the filing of the joint exceptions, plaintiffs, Jesse Wallace and wife, withdrew their exceptions and at the hearing did not resist the confirmation of the report of the commissioners. The court was of opinion that plaintiffs, both Jesse C. Wallace and wife and R. E. Bland and wife, are estopped from relying upon their exceptions by the execution and acceptance of the deed for a portion of the land allotted to Jesse C. Wallace and wife by the commissioners. In this there is no error.

The execution and acceptance of the deed was a ratification of the report. Neither plaintiff could further contend that the land should be sold for division, nor should R. E. Bland and wife be heard to contend further that the report should be set aside with respect to the land allotted to them as their share.

The contention of appellants that subsequent to the execution and acceptance of the deed and mortgage, there was an agreement between them and Jesse Wallace and his wife that the transaction resulting in the conveyance of the forty-one acres of land to appellants should be rescinded, is immaterial to the matters involved in this proceeding. There was no error in the refusal to hear or consider evidence with respect to the alleged agreement.

The suggestion that the controversy between the plaintiffs, which is the subject-matter of this appeal, has arisen because of the decline in land values since 1920, seems to have support. However this may be, we find no error in the record, and the judgment is

Affirmed.

TRAVELLERS INSURANCE COMPANY, MOORE LIME COMPANY, W. G. JAMES, L. J. POISSON AND OTHERS, RECEIVERS OF THE CITIZENS BANK AND TRUST COMPANY, VENDOR SLATE COMPANY, B. MIFFLIN HOOD BRICK COMPANY v. T. F. BOYD, AND THE COUNTY BOARD OF EDUCATION OF NEW HANOVER COUNTY.

(Filed 2 November, 1927.)

1. **Mechanics' Liens—Municipal Corporations—Schools—Public Buildings—Contracts—Equitable Assignments — Principal and Surety — Material—Laborers.**

Where a contractor for the construction of a municipal building has abandoned his contract, and the surety on his bond has obligated to pay for the materials used in the building and the laborers thereon, and the contractor has been paid in full up to the time of his abandonment, and the contractor has borrowed money from a bank secured by an order on the funds due him by the municipality when nothing was due: *Held*, the surety assuming to complete the contract is entitled to the balance of the funds in the hands of the municipality, regarding the order as an equitable assignment of the contractor's rights, as against the claim of the bank therefor.

2. **Same—Insurance—Indemnity Bonds—Premiums.**

Where the contractor for a municipal building has taken out policies of indemnity against loss for personal injuries to his employees and others not required by his contract with the municipality, applicable to all buildings he was then erecting, and has defaulted in the completion of his contract, and the surety on his bond with the municipality has taken it over for completion: *Held*, the surety on the contractor's bond with the municipality is entitled to the balance due on the building as against an unpaid premium due the indemnity company.

STACY, C. J., took no part in the consideration or decision of this case.

APPEAL by plaintiff, Travellers Insurance Company, and by defendant, T. F. Boyd, from *Bond, J.,* at April Term, 1927, of NEW HANOVER. Reversed in appeal of defendant, T. F. Boyd, and affirmed in appeal of plaintiff, Insurance Company.

Action by creditors of an insolvent contractor to recover of the surety on his bond for materials furnished by said creditors to the contractor for the construction of the high school building in the city of Wilmington. Plaintiffs, receivers of Citizens Bank and Trust Company, also demand judgment that they recover of the board of education of New Hanover County, upon an order, in writing, executed by the contractor, prior to his default, for the payment of money to said Trust Company, upon their contention that said order is an equitable assignment of money due or to become due by the board of education to said contractor.

The action was heard upon exceptions to the report of the referees. From judgment rendered plaintiff, Travellers Insurance Company, and defendant, T. F. Boyd, appealed to the Supreme Court.

Isaac C. Wright for Travellers Insurance Company and Poisson and Shepard, receivers.

E. K. Bryan for T. F. Boyd.

CONNOR, J. On or about 9 December, 1919, the board of education of New Hanover County entered into a written contract with the Liberty Engineering and Construction Company, a corporation, for the construction of a building in the city of Wilmington, to be known as the High School Building. The contract price for said building was $312,322, subject to such additions and deductions as were provided for in the contract. On 23 January, 1920, defendant, T. F. Boyd, became surety on the bond of said Engineering and Construction Company, given in accordance with the provisions of the contract. Pursuant to said contract the said company began the construction of said building and continued therein until 6 May, 1921, when it ceased work and abandoned the contract. It was then and is now insolvent.

Upon the default of said Engineering and Construction Company in its contract, it was agreed by and between the board of education and T. F. Boyd that said Boyd, as surety on the contractor's bond, should proceed with the construction of said building in accordance with the contract. The said Boyd, in accordance with said agreement, began work on said building and continued the construction of the building until on or about 1 October, 1921, when he ceased work thereon. The contract at that time had not been fully performed, but the board of education took possession of the building and began to use same for school purposes. The board has since had the building completed according to the contract, and is now using same as the High School Building of the City of Wilmington.

While defendant Boyd was at work on said building the architect issued to him, from time to time as the work progressed, and as was provided in the contract, certificates showing that he was entitled to receive from the board of education for the work done by him the sum of $93,527.25; of this amount the board of education has paid to defendant Boyd the sum of $83,253.28, leaving a balance due him, according to the architect's certificates, of $10,273.97. After deducting from this balance the total amount expended by the board for the completion of the building, according to the contract, since Boyd ceased work thereon, the court finds that there is now due by the board of education, on account of the contract price of the said high school building, the sum of $3,846.32, with interest from 1 January, 1922.

Judgments were rendered that plaintiffs, other than the receivers of Citizens Bank and Trust Company, and the Travellers Insurance Company, recover of defendant, T. F. Boyd, as surety on the bond of the contractor, the Liberty Engineering and Construction Company, the amounts of their claims for materials furnished to the contractor for the construction of said building, as stated in the judgments, with interest and costs. The total amount of said judgments, exclusive of interest and costs, is $5,941.98. There was no exception to these judgments.

The facts with respect to the claim of the receivers of Citizens Bank and Trust Company, as found by the referees, are as follows: On 13 September, 1920, the Liberty Engineering and Construction Company, then engaged in the performance of its contract with the board of education of New Hanover County for the construction of the high school building, borrowed from the Citizens Bank and Trust Company the sum of $4,000, which sum it promised to pay sixty days after date, as evidenced by its note. At the time said money was borrowed and said note was executed, the treasurer of said company stated to the said Trust Company that he had a payroll and some material to take care of. The said treasurer, in the name of the Engineering and Construction Company, gave to the Bank and Trust Company an order in writing addressed to the board of education of New Hanover County, requesting said board to pay to said Bank and Trust Company the sum of $4,000. The note was not paid at maturity, and was thereafter renewed. The said treasurer thereafter gave to said Bank and Trust Company, as security for the note, an order on Plymouth, and the Bank and Trust Company thereupon surrendered the order on the board of education of New Hanover County. The latter order was not paid, and on 16 February, 1921, this order was surrendered, and the following order given to the Bank and Trust Company:

"Wilmington, N. C., 16 February, 1921.

"New Hanover County Board of Education,
"Wilmington, N. C.

"Gentlemen:

"Please pay to order of Citizens Bank and Trust Company the sum of $4,000, for money advanced us in the construction of high school.

"LIBERTY ENGINEERING AND CONSTRUCTION COMPANY,
"By H. W. NUTT, *Treasurer.*"

It appears from the evidence offered at the trial before the referees that attorneys for Citizens Bank and Trust Company on 2 April, 1921, sent this order by mail to the board of education, requesting that it be paid according to its tenor. There is no evidence that the receipt of the order was acknowledged by the board of education, or that said board of education, at any time after the order was sent to it, was indebted to the Liberty Engineering and Construction Company in any sum on its contract or otherwise. The said company defaulted on its contract with said board soon thereafter, to wit, on 6 May, 1921, and did no work on said contract after that date. The contract was thereafter performed, at least in part, by defendant, T. F. Boyd, surety on the bond of the defaulting contractor.

The referees were of opinion that there was no evidence from which they could find that the money loaned to the Liberty Engineering and Construction Company by the Citizens Bank and Trust Company was loaned for the payment of labor done or material furnished in the construction of the high school building; they therefore concluded that defendant, T. F. Boyd, was not liable on his bond for said money. The court was of opinion that upon the facts found by the referees the order was an equitable assignment of the sum of $4,000, due or to become due to the Engineering and Construction Company on its contract with the board of education, and thereupon rendered judgment that L. J. Poisson and N. C. Shepard, receivers of the Citizens Bank and Trust Company, are entitled to the sum now in the hands of the board of education, to wit, $3,846.32, being the balance due on the contract price of the high school building. Defendant, T. F. Boyd, excepted to said judgment and assigns as error the holding of the court that said receivers are entitled to said sum by reason of an equitable assignment made by the Liberty Engineering and Construction Company to the Citizens Bank and Trust Company.

This assignment of error is sustained. Conceding that upon the facts found by the referees, there was an equitable assignment of the sum of $4,000 due or to be due by the board of education to the contractor (*Trust Co. v. Porter,* 191 N. C., 672; *Trust Co. v. Construction Co.,* 191 N. C., 664; *Hall v. Jones,* 151 N. C., 419; *Anniston Nat. Bank v. School Committee,* 118 N. C., 383; *Brem v. Covington,* 104 N. C., 589), and that by virtue of this assignment the Citizens Bank and Trust Company was entitled to recover of the board of education any sum, not in excess of $4,000, then or thereafter due by the board of education to the contractor, in the absence of a finding by the referees, or of evidence tending to show that the board of education was at the date of the assignment, or thereafter, indebted to the contractor for work done under its contract or otherwise there can be no recovery of the board of education by the receivers of the Bank and Trust Company, on account of such assignment. The sum now in the hands of the board of education, to wit, $3,846.32, is for work done by defendant, T. F. Boyd, as surety, in the performance of the contract, after default by the contractor. The said sum is due to T. F. Boyd and is not subject to the orders of the contractor, given prior or subsequent to the default. By the express terms of his bond, T. F. Boyd as surety was required to pay for labor done and material furnished to the contractor, upon his default. Judgments have been recovered in this action against the said surety for materials furnished to his principal, largely in excess of the amount now in the hands of the board of education.

There is no finding by the referees that the money loaned by the Citizens Bank and Trust Company to the Liberty Engineering and Construction Company was to be expended or was expended in payment for labor done or material furnished in the construction of the high school building at Wilmington. There is evidence tending to show that said company at the time the money was loaned was engaged in the performance of other contracts for which it had pay-rolls and material bills. The receivers are not entitled to recover of defendant Boyd for money loaned to his principal to be used in its business as a contractor, generally. *Bank v. Clark,* 192 N. C., 403.

The judgment, in so far as it adjudges that plaintiffs, receivers of Citizens Bank and Trust Company, are entitled to recover of the board of education the sum of $3,846.32, now in the hands of said board, is reversed.

The facts with respect to the claim of the Travellers Insurance Company are as follows: On 15 October, 1920, the Travellers Insurance Company issued to the Liberty Engineering and Construction Company two policies of insurance, one called "Employer's Liability Policy," and the other "Public Liability Policy."

By the "Employer's Liability Policy" the said Insurance Company agreed to indemnify the said Engineering and Construction Company against loss by reason of liability imposed by law for damages on account of injuries sustained by employees of said company while at work in Wilmington, N. C., or elsewhere in the State of North Carolina.

By the "Public Liability Policy" the said Insurance Company agreed to indemnify the said Engineering and Construction Company against loss by reason of liability imposed by law for damages on account of injuries sustained by any person or persons, except employees of the assured, when such injuries are sustained by reason of the business operations of the assured. Liability under this policy is not confined to injuries sustained by reason of the construction of the high school building at Wilmington, N. C.

The referees find that there is a balance due to the Travellers Insurance Company by the Liberty Engineering and Construction Company on the premiums for these policies of $2,763.58, and that these policies were procured by the Liberty Engineering and Construction Company in compliance with provisions in its contract with the board of education of New Hanover County. They therefore conclude as a matter of law that T. F. Boyd, surety on the bond of said Engineering and Construction Company, is liable to said Insurance Company for the amount of its claim. The exception of defendant Boyd to the finding of fact and to the conclusion of law of the referees was sustained by the court. It was thereupon adjudged that the Travellers Insurance Company is not entitled to recover judgment in any sum against defendant, T. F. Boyd, or defendant, the board of education of New Hanover County.

The assignment of error of the Travellers Insurance Company, based upon its exception to the judgment, cannot be sustained.

This record does not present for decision the question whether or not the surety on a defaulting contractor's bond is liable for the premium on an indemnity policy procured by the contractor in accordance with the requirements of his contract. The policies issued by the Insurance Company in this case to the contractor show upon their face that they were not procured by the contractor in compliance with any provision of the contract. There is no provision in either policy which purports to indemnify the board of education against losses mentioned in the fifteenth paragraph of the contract. The policies indemnify the assured generally, and not as the contractor for the high school building at Wilmington. The judgment that the Travellers Insurance Company is not entitled to recover of defendant, T. F. Boyd, as surety on the bond of the Liberty Engineering and Construction Company, is affirmed.

We think it very doubtful, at least, whether a surety on a contractor's bond, by the terms of which he is liable to third persons only for labor done or material furnished for the performance of the contract, can be held liable for the premium on an insurance policy procured by the contractor in accordance with the requirements of the contract. It does not seem that insurance can be included within the terms, labor or material, although our decisions have given a very liberal construction to those terms. See *Grocery Co. v. Ross, ante,* 109.

Defendant, T. F. Boyd, is entitled to judgment that he recover of his codefendant, the board of education of New Hanover County, the balance due upon the contract for the construction of the high school building. The action is remanded that judgment may be entered in accordance with this opinion.

Error in part.

STACY, C. J., took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA EX REL. COUNTY OF GREENE ET AL. v. FIRST NATIONAL BANK OF SNOW HILL ET AL.

(Filed 2 November, 1927.)

1. **Pleadings—Demurrer—Admissions—Matters of Law.**

A demurrer to the complaint tests the sufficiency of its allegations and reasonable inferences of fact therefrom to constitute a cause of action, and do not extend to conclusions or inferences arising therefrom as matters of law.

2. **Counties—County Treasurer—Banks and Banking—Statutes—Depositories—Principal and Agent—Deposits.**

Where a county authorized by statute has appointed a bank as its fiscal agent to perform the duties of the treasurer for the county requiring a bond for the faithful performance of such duties, the surety on the bond is liable only for the proper performance of these duties of its principal.

3. **Same—Interest—Loans.**

A local bank acting under a valid appointment to perform the duties of a county treasurer, as the fiscal agent of the county, is not required by C. S., 1393, to pay interest on the deposits of county funds thus received by it, and the surety on its bond is not liable for the failure of the special depository to charge itself interest on the deposits except when the bank has loaned the funds out to third parties.

4. **Same—Roads and Highways—Deposits — Special Depositories — Malfeasance—Officers.**

Where a local bank has been lawfully appointed to perform the duties ordinarily performed by the county treasurer, and has also been appointed as a special depository for the proceeds of sale of an issue of bonds for highway construction upon which interest is required to be paid, C. S., 3655, in this dual capacity the surety on its bond for the faithful performance by the bank of the duties of county treasurer is not liable for the failure of the bank to collect interest on the funds received by it from the sale of the highway bonds, as such was not in contemplation of the surety bond. C. S., 3650.

APPEAL by defendant, Fidelity and Deposit Company of Maryland, from *Cranmer, J.*, at February Term, 1927, of GREENE.

Civil action to recover of the defendant, First National Bank of Snow Hill, as principal, and Fidelity and Deposit Company of Maryland, as surety, moneys alleged to be due, or wrongfully withheld, or not properly accounted for, by the said principal as the duly accredited Financial Agent of Greene County.

Three causes of action are set out in the complaint, to each of which the appealing defendant demurred. The demurrer was sustained as to the third cause of action and overruled as to the first two. This appeal is from the judgment overruling the demurrer to the first and second causes of action.

The material allegations of the complaint, so far as essential to a proper understanding of the legal questions involved, may be abridged and stated as follows:

FIRST CAUSE OF ACTION.

1. On 1 November, 1920, the First National Bank of Snow Hill was duly appointed financial agent of Greene County for a term beginning the first Monday in December, 1920, and ending the first Monday in

December, 1922, under and by virtue of chapter 664, Public-Local Laws 1915, the pertinent provisions of which are as follows:

"Section 1. That the board of county commissioners of Greene County is hereby authorized and empowered, in its discretion, to abolish the office of county treasurer in the said county of Greene, and in lieu thereof to appoint one or more solvent banks or trust companies located in its county as financial agent for said county, which said bank or trust company shall perform the duties now performed by the treasurer of said county: *Provided,* that such bank or trust company shall not charge nor receive compensation for its services other than such advantage and benefit as may accrue from the deposit of the county funds in the regular course of banking.

"Section 2. That said bank or trust company appointed and acting as the financial agent of its county shall be appointed for a term of two years, and shall be required to execute the same bonds for the safe-keeping and proper accounting of such funds as may come into its possession and belonging to said county and for the faithful discharge of its duties as are now required by law of county treasurers."

(Note.—This act was repealed by chapter 53, Public-Local Laws 1925, and the office of treasurer of Greene County reëstablished.)

2. The appointment of the First National Bank of Snow Hill as financial agent of Greene County was made pursuant to and in consideration of its offer to pay 5 per cent interest on average monthly balances of county funds received and held by it as financial agent.

3. Prior to entering upon its duties as financial agent of Greene County, the said First National Bank of Snow Hill, as required by law, executed a bond in the sum of $25,000, with the Fidelity and Deposit Company of Maryland as surety thereon, for the faithful performance of its duties as financial agent, the condition of said bond being that "if the said First National Bank of Snow Hill, North Carolina, shall, during its term of office, well and faithfully execute the duties of its office and pay, according to law, and on the warrant of the chairman of the board of county commissioners, all moneys which shall come into its hands as financial agent, and to render a just and true account thereof to the board when required by law, or by said board of commissioners, then this obligation to be null and void, otherwise to remain in full force and effect."

4. It is further alleged that by reason of the agreement to pay interest on average monthly balances, as aforesaid, the First National Bank of Snow Hill became indebted to the county of Greene in the sum of $48,154.19, of which said amount $31,307.07 has been paid, leaving a

balance of $16,847.12 still due and unpaid. Wherefore, plaintiff prays judgment against the defendants for the amount of interest now due and unpaid by reason of said agreement.

SECOND CAUSE OF ACTION.

1. In addition to the facts showing the relation of the parties, as above set out, it is alleged that on 18 July, 1921, the board of commissioners of Greene County duly authorized the issuance of county bonds in the sum of $550,000 for the purpose of building and repairing the public roads and buildings of the county as, by chapter 70 of the Consolidated Statutes, the said board was empowered to do, section 3655 being as follows:

"All moneys derived from the sale of bonds authorized and sold under the provisions of this article or from the levy of the special road tax authorized under the provisions of this article shall be deposited by the board of county commissioners in such solvent bank or banks, if any, of said county, or if there is no bank in said county, then in any solvent bank in a neighboring county as will pay the highest rate of interest on daily balances as may be determined by the board of county commissioners, said moneys to be deposited in said bank or banks to the credit of the county road commission hereinafter provided for, and to be drawn by said commission as hereinafter directed."

2. The board of commissioners of Greene County authorized the sale of said bonds to Moyer Mendenhall, cashier of the First National Bank of Snow Hill, at par and accrued interest, further directing that upon the execution of said bonds they should be delivered to the First National Bank of Snow Hill, the county's financial agent, to be by it delivered to the purchaser upon payment of the purchase price.

3. The defendant, upon receipt of said bonds, delivered same to the purchaser, but failed to collect $5,683.34 of accrued interest and $45,475 of the principal, and paid out of the sum received a fee of $5,000 to certain bond-buyers. Plaintiff seeks to recover these sums, alleging as the basis of its second cause of action that the First National Bank of Snow Hill, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are liable for the payment thereof.

From the judgment overruling the demurrer to the first and second causes of action, the Fidelity and Deposit Company of Maryland appeals, assigning errors.

J. A. Albritton, Cowper, Whitaker & Allen and Albion Dunn for plaintiff.

L. V. Morrill and Washington Bowie, Jr., for defendant, Fidelity and Deposit Company of Maryland.

STACY, C. J., after stating the case: The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted, but the principle does not extend to the admission of conclusions or inferences of law. *Brick Co. v. Gentry,* 191 N. C., 636; *Board of Health v. Comrs.,* 173 N. C., 250; *Wood v. Kincaid,* 144 N. C., 393.

With respect to the first cause of action, it is sufficient to say that the duties of the First National Bank of Snow Hill, as financial agent of Greene County, for the faithful performance of which the bond in suit was given, are to be ascertained by reference to the statutes defining the duties of a county treasurer. Neither the industry of counsel nor our own research has discovered any law which requires a county treasurer to pay interest on funds in his hands as such.

True, it is provided by C. S., 1393, subsec. 5, that if any part of the public funds in the hands of a county treasurer has been loaned out by him, he shall account for the interest received thereon, but this is not the interest for which the plaintiff sues. There is no allegation of any interest received on moneys loaned and not covered into the treasury of the county. The action is for interest agreed to be paid, and not paid, on funds received by the financial agent of the county and held by it as such. As the law did not impose this duty upon the financial agent of the county, we cannot hold the surety liable on the bond in suit. *Board of Education v. Bateman,* 102 N. C., 52, 8 S. E., 882.

The liability of the bondsman is the only question presented by the appeal. The fact that the principal went beyond the requirements of the law and agreed to pay interest on funds in its hands as financial agent, cannot enlarge the liability of the surety beyond that imposed by law and the terms of its contract of suretyship. Such liability is neither prescribed by statute nor nominated in the bond. *Ins. Co. v. Durham County,* 190 N. C., 58. It was never intended by the act of the Legislature, ch. 664, Public-Local Laws 1925, that the treasurership or financial agency of Greene County should be farmed out or let to the highest bidder. The board of county commissioners was authorized and empowered, in its discretion, to abolish the office of county treasurer and, in lieu thereof, to appoint one or more solvent banks and trust companies as financial agent of the county to perform the duties of treasurer.

The second cause of action is likewise untenable as against the Fidelity and Deposit Company of Maryland. It is founded upon allegations of misfeasance on the part of the First National Bank of Snow Hill in the discharge of duties not required of it as financial agent of Greene County and not covered by the bond in suit.

It was no part of the duties of the county treasurer, or financial agent, as such, to handle the funds derived from a sale of the road bonds in question; but such funds, under C. S., 3655, above set out, were to be deposited by the board of county commissioners in some solvent bank or banks, agreeing to pay the highest rate of interest on daily balances, to the credit of the county road commission, and subject to the orders of said road commission.

The fact that the commissioners selected the First National Bank of Snow Hill as such depository, without bond, as the statute required none, even though designated as the financial agent of the county, did not render the Fidelity and Deposit Company of Maryland liable on its contract of suretyship. If the said bank acted as agent of the board of county commissioners in handling the bonds in question, it did so as such agent, and not in its capacity as financial agent of the county.

But it is contended that the bonds in question were received by the First National Bank of Snow Hill under color of its office as financial agent of the county and, therefore, it was charged with the duty of faithfully accounting for the same. In support of this position, plaintiff cites C. S., 3650, which is as follows:

"In selling the bonds and in handling the funds derived from the sale of the bonds, and in turning same over to the bank or banks of the county hereinafter authorized to be the depository of such funds, the board of county commissioners, the county road commission, or the treasurer of the county shall not be allowed any fees for handling such funds."

It is conceivable that this position might be tenable under a certain state of facts, but, on the present allegations, it is hardly permissible to infer that the bonds in question were delivered to the First National Bank of Snow Hill, as financial agent of the county, to be by it delivered to the purchaser, and the proceeds derived therefrom to be received by the financial agent of the county in its capacity as such, and by it to be delivered to itself as the designated depository of said funds. It is quite patent, from the allegations presently appearing of record, that in the handling of these bonds the First National Bank of Snow Hill was acting as the designated depository of the funds to be derived from a sale of the same. *Board of Education v. Bateman, supra.*

Upon the record we think the demurrer, interposed by the Fidelity and Deposit Company of Maryland to the first and second causes of action, should have been sustained.

Reversed.

STATE v. ROY EVERETT.

(Filed 2 November, 1927.)

Criminal Law—Homicide—Evidence—Nonsuit—Death—Knife Wound—Cause and Effect—Blood Poisoning.

Evidence tending only to show, upon a trial for wife murder, that the prisoner unintentionally in his sleep, as a result of a bad dream, inflicted upon his wife a wound too slight to have caused her death, except that from its neglect of treatment it may have been possible for blood poisoning to have set in therefrom that caused her death, is insufficient in law to sustain a conviction of manslaughter, and defendant's motion as of nonsuit should have been sustained, under C. S., 4643, in the absence of evidence, expert or otherwise, that death in the particular case, resulted from the wound's being infected by the poison; and where physicians have made an autopsy by exhuming the body of the wife after her burial, and the condition of her body was such as to make it in their opinion impossible to say that the particular wound resulted in death, this testimony alone is insufficient to sustain a verdict of manslaughter.

Appeal by defendant from *Barnhill, J.,* at May Term, 1927, of Cumberland. Reversed.

Indictment for murder. From judgment on the verdict that defendant is guilty of manslaughter, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Bullard & Stringfield for defendant.

Connor, J. The deceased, Nina Everett, was the wife of defendant, Roy Everett. She died at their home in Cumberland County on Monday, 2 May, 1927. The State contended that her death was the result of a wound upon her head inflicted by defendant on Sunday night, 24 April, 1927, with a knife or some sharp instrument; that said wound became infected, because of neglect, and that this infection was taken into her circulatory system and carried thereby to her brain, causing cerebrospinal meningitis, which was the direct and immediate cause of her death.

There was evidence tending to show that on Monday, 25 April, 1927, a week before the death of deceased, defendant told a witness for the State, with whom he was at work in a field on his farm, that during the preceding night, while he was asleep, he had a dream that in his dream he saw a man coming toward him with a knife, threatening to kill him; that he said to the man, "I will cut you if you come on me";

that when he awaked he was in his wife's room and that he and she were on the floor; and that in response to a question addressed to her, she said to him, "The point of your knife was on the back of my head." This was the only evidence from which the jury could find that defendant inflicted a wound upon the head of deceased. There was evidence that when inquiry was made, both before and after her death, as to whether deceased had been stricken on the head, defendant said that he had never struck his wife. There was no evidence other than the testimony of this witness as to the statement made to him by defendant that he had struck his wife, at any time. There was an utter absence of evidence showing any motive or provocation for defendant to strike or cut his wife.

A witness for the State, the daughter of a tenant on defendant's farm, testified that deceased came to her home, about a fourth of a mile from deceased's home, with her baby in her arms, between 8:30 and 9 o'clock on Monday morning, 25 April, 1927; that while deceased was there, witness saw a cut on the left side of her head—a little cut above her ear. Deceased's hair was bobbed. This witness returned with deceased to her home, at her request, and spent the day there with her. She testified that she saw deceased at her home every day from then until her death. She took no further notice of the cut on deceased's head, which she referred to in her testimony as "a little scratch."

Another witness, who lived in defendant's home and worked for him on his farm, testified that on Monday, 25 April, 1927, he observed some blood on deceased's hair, on the left side of her head. These were the only witnesses who testified to having seen any wound on deceased's head prior to her death. There was evidence tending to show that during the week preceding her death deceased was engaged in her usual household duties, until Saturday, and that she visited neighbors during the week. On Wednesday she complained of a severe headache; she was sick during the remainder of the week, but was not confined to the house until Sunday. On Sunday defendant called a physician to see her. She was then unconscious, and not able to speak, except in monosyllables. She died about twenty-four hours after the physician's first visit. He testified that her condition was hopeless when he first saw her, and that he made no examination of her body and saw no wound on her head prior to her death. In the opinion of this physician, deceased's death was caused by cerebrospinal meningitis. This disease, the physician testified, is essentially and necessarily a disease of the brain and spine. The term is elastic and may be used to cover any disease of the brain or spinal cord of a non-specific nature. The disease may be caused by infection in an open wound, in a diseased kidney, or by other infection, either external or internal.

The body of the deceased was exhumed about eighteen days after it was buried, and an autopsy held immediately thereafter. Physicians, admitted to be experts, who examined the body at the autopsy, testified that they found on the back of her head a scalp wound about one and a half inches in length; that in their opinion this wound was caused by a knife or some sharp instrument. They expressed no opinion as to when the wound was inflicted. The skull was not cracked. There was no injury to the skull or to the brain. These physicians said that they could not testify as to the character of the wound, because the tissues were in such condition that they could not make an examination of the wound. The skin on deceased's head was in such condition that the hair on her head was easily removed. There was no wound on the body of deceased except the scalp wound. There was no evidence from which the jury could find that this scalp wound was the direct and immediate cause of her death. The wound as described by the witnesses who saw it, before and after her death, was not a mortal wound, nor was it adequate and calculated, of itself, to cause death. The State did not so contend; its contention was that the wound became infected, because of neglect, and that this infection, taken up and carried to her brain, by her circulatory system, caused cerebrospinal meningitis, which was the direct and immediate cause of her death.

In this case, where it appears from all the evidence that the only wound on the body of deceased, prior to her death, was not mortal, and was not adequate and calculated, of itself, to produce death, although the jury may find from the evidence that it was inflicted by defendant, in the absence of evidence tending to show affirmatively that it was the result of an unlawful act of the defendant, it may be doubted whether the defendant can be held liable on an indictment for either murder or manslaughter, because after the infliction of the wound, it became infected because of neglect, with the result that the deceased died of cerebrospinal meningitis, caused by infection of the wound. It has been generally held that if a wound or other injury causes a disease, such as gangrene, empyema, erysipelas, pneumonia or the like, from which the wounded or injured person dies, he who inflicted the wound or other injury, is responsible for the death. This principle has been applied where the wound is mortal, or is adequate and calculated to produce death, and was inflicted as the result of an unlawful act. In the absence of authority to the contrary, it would not seem to be applicable, when the wound is neither mortal nor adequate and calculated to produce death, and was inflicted by one who was not engaged at the time in doing an unlawful act. 29 C. J., 1080, and cases cited in the notes; *S. v. Hambright,* 111 N. C., 708; *S. v. Baker,* 46 N. C., 267; *People v. Kane,* 213 N. Y., 260, 107 N. E., 655, L. R. A., 1915F, 607, and cases cited in note. Certainly, in the absence of evidence from which the jury can find that the disease which caused the death, resulted from the wound, the person who inflicted the wound, but who did not cause the disease, cannot be held liable, in a criminal action for the death. See *S. v. Scates,* 50 N. C., 420, where it is said by *Battle, J.:* "If one man inflicts a mortal wound of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice."

If the disease was the cause of the death of deceased, independently of the wound, although the jury may find that defendant inflicted the wound, as contended by the State, he cannot be held responsible for her death. The testimony of the expert witnesses is to the effect that the wound could not have caused the death of deceased, unless it be found as a fact that the disease which was the cause of her death, was the result of the wound, and that this fact could not be found unless the wound became infected prior to her death. The determinative question, therefore, on defendant's motion, made at the close of the evidence, under C. S., 4643, is whether or not there was evidence from which the jury could find that the wound became infected prior to the death of deceased.

A careful scrutiny of the testimony of the expert witnesses fails to disclose any evidence showing or tending to show that the wound, which neither of them saw prior to her death, was infected. Their conjectures cannot be accepted as evidence; they testified to no facts from which the jury could draw the inference that the wound was infected. There was no evidence tending to establish facts upon which expert witnesses could testify as to the essential fact involved in the State's contention that defendant by inflicting the wound upon the head of deceased caused her death. Defendant's motion that the action be dismissed should have been allowed, and judgment entered accordingly. The judgment that the defendant be confined in the State's prison for two years is

Reversed.

JAMES TROXLER v. SOUTHERN RAILWAY COMPANY.

(Filed 2 November, 1927.)

1. **Actions—Federal Employers' Liability Act—Courts—Federal Decisions—Practice—Procedure.**

   Upon the trial of an action brought in the State court to recover damages against a railroad company for personal injuries alleged to have been negligently inflicted, the decisions of the Federal Court control, but the rules of practice and procedure in the State court are followed.

2. **Master and Servant—Employer and Employee—Evidence—Assumption of Risks—Issues.**

   Evidence tending to show that the plaintiff, in the scope of his employment with the defendant railroad company, was engaged in repairing a part of a machine used for loading rails upon the defendant's cars, and he was in a position of safety except for the negligence of the defendant's other employees, acting under the supervision of the defendant's vice-principal or *alter ego*, which resulted in a part of the loader flying around and striking the plaintiff causing the injury in suit, and the work upon which the plaintiff was engaged was not obviously or intrinsically dangerous otherwise: *Held*, insufficient to raise an issue of assumption of risks.

3. **Same—Negligence—Nonsuit.**

   Held, upon the facts of this appeal, defendant's motion as of nonsuit upon the evidence was properly denied.

APPEAL from *Harding, J.*, and a jury, at February Term, 1927, of ROCKINGHAM. No error.

This was an action for actionable negligence, brought by plaintiff against defendant for damages under the Federal Employers' Liability Act. The plaintiff, an employee of defendant, in substance, alleged: That defendant was using a rail-loader in picking up steel rails and placing them on flat cars. The loader was built on a flat car, the crane, or boom, was so constructed as to swing around and pick up the rails and place them on the car. The loader was operated by compressed air from the engine attached to the work train. A steel cable was fastened to the boom or crane and wound around a large drum, and was part of the equipment of the loader and used in lifting and placing the rails. The cable fastened to the loader had come out of adjustment. The plaintiff was working on the cable, fastening certain bolts, and the defendant negligently caused the boom or crane to swing around and strike the plaintiff on the left leg below the knee inflicting permanent injury.

The defendant denied negligence, plead assumption of risk and contributory negligence and diminution of damages.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff, by his own negligence, contribute to his own injury, as alleged in the answer? Answer: Yes.

"3. What damages, if any, is plaintiff entitled to recover of the defendant? Answer: $1,000."

P. T. Stiers for plaintiff.
Brown & Trotter for defendant.

CLARKSON, J. The carefully prepared supplemental brief of defendant, giving authorities that "the provisions of the Federal Employers' Liability Act are applicable to the facts in this case," was unnecessary. It was brought under the act. The complaint so states. The decisions of the Federal Courts were applicable in the trial of this action. "The decisions of the Federal Courts control over the State Courts in all actions prosecuted in the State courts, but the rules of practice and procedure are governed by the laws of the States where the cases are pending." *Inge v. R. R.,* 192 N. C., at p. 526.

Plaintiff testified, "We had taken the cable loose, and I was putting it back on and tightening some bolts—I sitting straddling the drum. . . . The foreman was Mr. L. B. Davis. I do not see him here. He was standing up there when I was working, and he was directing the work; he was a white man, and my boss. . . . When I was working there with my head down some of the rest of the men untied the boom and swung it around over the flat car that was connected with the loader. At the time I went to work this cable was tied. It was tied around with the rail-loader, with ropes around. The boom (or crane) wheeled around and fell on the main line. We were standing on the side-track, the rail-loader was, and it fell across the main line, and when it hit the ground that knocked the boom stand out of socket, and that struck me on the leg and cut a long gash on my leg. . . . When you fasten the chains the boom can't swing around. . . . The boom could not swing around if the chains were fastened. The chains were not fastened at the time it swung around and broke my leg. There was a rope fastened at the time to it, but no one had hold of the rope; they turned it loose or let it get away from them. . . . The boom was fastened down when I went to work on the cable that morning."

The plaintiff was working with his head down. The foreman, the alter ego, was standing there directing the work. The work was not so obviously dangerous that a reasonably prudent man, under similar circumstances, would not do and should refuse to do it. The foreman, Davis, represented the defendant and had the right to give orders to plaintiff and direct the work. The issue of assumption of risk was not applicable to the facts in the present case. The court below charged fully and clearly the law applicable to the facts, and perhaps more liberal for defendant than it was entitled to. *Jones v. R. R.*, 176 N. C., p. 264-5; *Inge v. R. R., supra* (petition for writ of *certiorari* denied by U. S. Supreme Court, 28 February, 1927); *Robinson v. Ivey,* 193 N. C., at p. 812.

The foreman "was a white man and my boss"—the plaintiff was obedient to authority and, under the facts here disclosed, we can find no evidence of assumption of risk.

The assignment of error based on the motions of defendant for judgment as in case of nonsuit at the close of plaintiff's evidence, and at the close of all the evidence (C. S., 567), cannot be sustained. The assignments of error to the refusal of the court below to submit an issue tendered by defendant as to assumption of risk, and failing to charge the jury relative thereto, cannot be sustained. In law we can find

No error.

E. P. BOND et al. v. VICTOR McA. BOND et al.

(Filed 2 November, 1927.)

Estates—Contingent Remainders—Happening of Event—Vested Estates —Sales—Reinvestment.

Where the testator devises lands for life to a certain of his nephews by name, with limitation over to the first female child who may be born to him if named for the testator, with certain further contingent limitations on the non-happening of the first contingency, upon the birth of the female child and its being named for the testator according to the terms of the will, the remainder becomes certain as to the beneficiary designated, and becomes vested and is descendible to the heirs at law of such beneficiary: *Held further,* as to the right to have the lands so devised sold for reinvestment. See *McLean v. Caldwell,* 178 N. C., 424.

Appeal by defendants from *Bond, J.,* at September Term, 1927, of Robeson.

Controversy without action for construction of the will of Fannie Bond Peterson. The second item follows: "I give and devise to my nephew, Eugene Bond, son of R. S. Bond, my house and lot in the town of Lumberton, the same being all the real estate I now own, to be his during the term of his natural life, and after his death to his oldest daughter, if he shall have one, who shall be named for me, and if he shall have no daughter, then to his oldest son; and if he should die without issue, then I give and devise said property to Victor Bond, son of R. S. Bond, for and during the term of his life, and after his death to the oldest lawful child of the said Victor Bond, who may be living at the time of his death; and if the said Victor Bond should die without lawful issue, then I give and devise the property to Allen Bond, another son of my brother, R. S. Bond, and to his lawful heirs."

Upon the agreed facts it was adjudged that Fannie Bond, infant, took a vested remainder in the land described in item 2; that upon her death her interest descended to the plaintiffs, E. P. Bond, Jr., R. S. Bond, Jr., and William E. Bond, her surviving brothers, and that the title to the property and to the funds set out in paragraph 8 of the agreed facts ($16,300) is now vested in them subject to the life estate of their father, and that the rents shall go to E. P. Bond during his life, and thereafter to the brothers named above. Exception and appeal by defendants. Affirmed.

Dickson McLean and H. E. Stacy for plaintiffs.
J. G. McCormick for defendants.

ADAMS, J. The controversy is to be determined by the interpretation of the second item of the will. If Fannie Bond, who was born 14 September, 1926, acquired a vested remainder under this item there is no error in the judgment. The right of sale for reinvestment was settled in *McLean v. Caldwell,* 178 N. C., 424.

Fearne says: "Wherever the preceding estate is limited so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse,* and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, wherever the preceding estate is limited so as to determine only on an event which is uncertain and may never happen, or wherever the remainder is limited to a person not *in esse,* or not ascertained, or wherever it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent." Fearne on Remainders, Vol. 1, pp. 216, 217. When the remainder is given to a person not in being the preceding estate is not limited by an event which certainly must happen. At the time the will was made it was uncertain whether the life tenant would be the father of a daughter who should be named for the testatrix, and for this reason the remainder was then contingent; but when the daughter was born and named the remainder *eo instanti* became vested. The devise is, "After his death to his oldest daughter, if he shall have one, who shall be named for me." Fannie was his only daughter, and necessarily he could have none older. "If A. be a tenant for life with remainder to B.'s eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B. will have a son or no; but the instant that a son is born, the remainder is no longer contingent, but vested." 2 Bl., 169. See 23 R. C. L., 499, sec. 30. The infant by reason of her vested estate had such seizin in the land as was necessary to make her interest descendible to her heirs. *Early v. Early,* 134 N. C., 258; *Tyndall v. Tyndall,* 186 N. C., 272. There is a discussion of the subject with citation of authorities in *Power Co. v. Haywood,* 186 N. C., 313. The judgment is

Affirmed.

D. L. GORE v. CITY OF WILMINGTON.

(Filed 2 November, 1927.)

1. **Evidence—Nonsuit.**

On the defendant's motion as of nonsuit the evidence, and every reasonable inference therefrom, is to be accepted as true and construed in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment to be drawn therefrom.

2. **Water and Water Courses — Cities and Towns — Streets — Surface Waters—Negligence—Damages.**

Where there is evidence tending to show that a city has formerly constructed and maintained a proper drainage for its streets then sufficient to carry off the surface water, and prevent its accumulation to the damage to property situate upon the same, and by a change to hardsurfacing its streets the flow of the water has been so largely increased as admittedly to render its drainage system grossly inadequate: *Held,* it is sufficient to make out a case of actionable negligence against the city for damages caused to an owner of lands by reason of an overflow of water destroying a garage he had erected.

3. **Same—Drainage.**

In hardsurfacing its streets and largely increasing the flow of surface water thereon, a city is required in the exercise of due care, to provide drainage reasonably sufficient to carry off the increase of the flow of water so as not to cause damages to the landowners.

4. **Instructions—Requests for Instructions—Statutes.**

Where the judge has sufficiently charged the jury as to the law arising under the evidence in the case in compliance with C. S., 564, such further matters of instruction as the appellant may desire should be offered by special request for instruction.

5. **Pleadings—Bill of Particulars—Motions.**

Where the pleading objected to is sufficient in law, the party should aptly move for a bill of particulars to obtain more detailed information as to the matters alleged.

APPEAL by defendant from *Bond, J.,* and a jury at May Term, 1927, of NEW HANOVER. No error.

This is an action for actionable negligence brought by plaintiff against defendant for damages. Plaintiff is the owner of a certain piece of land in the city of Wilmington on the west side of Third Street, between Princess and Market streets, on which is located a garage known as Johnson Motor Company Garage. Formerly an open branch, or natural water course, known as Jacobs Run, which empties into the Cape Fear River, flowed under said garage.

The plaintiff alleges: "That the city of Wilmington in constructing, maintaining and operating the said Jacobs Run and the surface drains along the streets of the city of Wilmington on Third Street and elsewhere in the neighborhood of the property of this plaintiff, has negligently constructed, maintained and operated said drains in that it has turned into Jacobs Run and into surface drains adjacent to the property owned by the plaintiff great amounts of water in excess of the amounts which can be accommodated by said drains, thereby causing the water to overflow the said drains and streets frequently and repeatedly in case of large rains, though not unusual rains, thereby damaging the property of the plaintiff and others.

"That on account of the said negligent construction, maintenance and operation of the said drains, as above alleged, the said city of Wilmington negligently and carelessly caused to be turned into Jacobs Run on or about 25 July, 1922, large quantities of water, causing great pressure against the underpining and walls of the property of the plaintiff, undermining same and causing the said walls to tumble and fall down, to the great damage of the plaintiff in the amount of about $3,500.

"That the plaintiff promptly served notice on the city of Wilmington of the said claim and damage and demanded payment thereof by the defendant and the defendant has refused to pay same."

The defendant denied the material allegations of the complaint, and in further answer says: "That it has and exercises such control within its boundaries, of the construction, maintenance and supervision of the streets and sidewalks of said city and of the grades thereof and of the drains and watercourses within the city limits, as are conferred upon it by law, and as are particularly conferred upon it by chapter 244 of the Private Laws of 1907, and the acts amendatory thereof, together with such powers as are conferred upon it by the present city charter."

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the injury and damage to plaintiff's property caused by the unlawful acts, or omissions of the defendant, as alleged in the complaint? Answer: Yes.

"2. What damage, if any, has the plaintiff sustained by reason of such unlawful acts, or omissions? Answer: $2,000, with interest from 1 October, 1922."

Numerous exceptions and assignments of error were made by defendant. The material ones and necessary facts will be considered in the opinion.

Rountree & Carr for plaintiff.
K. O. Burgwin for defendant.

CLARKSON, J. The main assignment of error made by defendant was that the court below overruled defendant's motion for judgment as in case of nonsuit at the close of plaintiff's evidence and at the close of all the evidence. C. S., 567. In this we think there was no error.

"It is the settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.' *Christman v. Hilliard,* 167 N. C., p. 6; *Oil Co. v. Hunt,* 187 N. C., p. 159; *Davis v. Long,* 189 N. C., p. 131." *Nash v. Royster,* 189 N. C., at p. 410.

The action was one for actionable negligence. The evidence of plaintiff was to the effect, shown by direct and circumstantial evidence, that Jacobs Run was a natural watercourse, Jacobs Run watershed draining an area of about thirty-five acres. In comparatively recent years the streets affected by this drainage territory or watershed have been graded and hardsurfaced; that prior to the building of the hardsurfaced streets in the drainage area, the streets were sand and porous and absorbed the rainfall, 44% of the drainage is street area. If the streets were all sand, like they once were, 80% would be absorbed and 40% run off, but now 90% of the water flows over the hardsurface.

The defendant had changed the streets from sandy, porous soil to hardsurface, creating an artificial flow of water of much greater volume into Jacobs Run.

The garage was built over Jacobs Run. The natural flow on the streets was down to the garage, which was lower. To drain the run through courthouse yard, above the garage, an 18-inch terra cotta pipe underground was installed, which drained into a manhole or catch-basin on the east side of Third Street. Then there is a 36-inch masonry culvert under Third Street. Then in front of the garage on the west side of Third Street is a manhole or catch-basin, connected to two 24-inch terra cotta pipes underground leading under the garage, extending on towards Second Street and emptied into the Cape Fear River. The old culvert and terra cotta piping was put in Jacobs Run when the streets in the drainage territory or area were sand, prior to the hardsurfacing of said streets—Market, Third and Princess.

The water coming down the streets, since the hardsurfacing, during heavy but not unusual rains, would be of such volume and traveling at such speed that large and excessive quantities would not go into the manholes or catch-basins, but would flow down the hardsurfaced streets into the garage of plaintiff's lessee.

The gutter on the west side of Third Street, in front of the garage, was about 20 inches below the level of the entrance of the garage. From the accumulation and velocity of the water in the streets, the water would flow down Third Street to the lowest level in ordinary, but not unusual, rains into and flood the garage. The Johnson Motor Company provided a special cut board of pine 1 x 12 inches to fit the door of the garage to hold the water back, and the water even then came over the 12-inch board. This condition could be seen from the City Hall and continued for years. The water would accumulate a foot deep over the manhole or drain in front of the garage, and it would not carry the water off. On 25 July, 1922, at the time the wall collapsed, the water burst through the big swinging front doors of the garage and washed right through like a river. It banked up on the back of the building. The weight of the water shoved the building out. The wall fell completely from top to the bottom. It didn't drop down, but turned out both ways, west and south.

Defendant showed that in the last ten years there had been in that section an increase in rainfall; that the manholes or catch-basins, including those in front of Johnson Motor Company Garage, are of the ordinary, usual and customary design. Princess Street was paved before

1908. Third Street was paved about 1912. The manholes or catch-basins were constructed when the streets were paved. It was usual and customary for engineers to provide for a rainfall not to exceed two inches per hour; that is the basis in Eastern North Carolina, so that in designing the catch-basins, manholes or storm sewers, the city provided drainage based on a certain rainfall of not exceeding two inches per hour. This was reasonably adequate prior to the last four or five years, for that purpose; that the injury to plaintiff's building was caused by obstructions to the manholes or drains by plaintiff's lessee.

The defendant also offered evidence tending to show that the foundation of plaintiff's building was not properly constructed for the wall of the kind, under the conditions. On cross-examination J. L. Becton, a witness for defendant and civil engineer representing defendant in street construction work, testified, without objection, in part: "I have recently made complete survey of the area of Jacobs Run and designed a sewer for the city and installed it to take care of three inches per hour. After making that investigation of Jacobs Run it is a fact that I decided, as an engineer, that it was necessary for the city to provide other means of drainage, and as a result of that I began at the river at the Market Street dock and installed a culvert, constructed of cement from that point up to the courthouse, for the purpose of relieving the water in this drainage area. This culvert is 54 inches at the river and 48 inches from Second to Third Street, and 42 inches from there to near Fourth and Princess. Old Jacobs Run was 36 inches, and my pipe is 48 inches where I come into it. The Jacobs Run pipe was 36 inches. That 36-inch pipe extended just across Third Street to the manhole in front of the Johnson Garage. From the manhole in front of Johnson's Garage, Jacobs Run consisted of a couple of 24-inch pipes approximately the same carrying capacity as the 26-inch. The area of the cross-section of a 48-inch pipe is twice as large as the area of the two 24-inch pipes. The comparison between the 36-inch pipe as compared to the 48-inch pipe is about seven to twelve. In other words, the 48-inch pipe would carry in the proportion of seven to twelve. The new system recently installed has been substituted for Jacobs Run. It has about twice the carrying capacity of Jacobs Run. Jacobs Run, where we tore it up at Second Street, was in good condition. As far as we could observe to Johnson's Garage it was in reasonably good condition. One of the pipes was cracked, but didn't look to be in serious condition. The new drain only takes care of three inches of rainfall per hour. At present the capacity of the new drain is twice as much as the old one. Jacobs Run, ten or fifteen years ago would, I would say, have been adequate with the experience and practice at the time, for a two-inch run-off on an area like this. The fellows who put in that system considered its capacity in excess of requirements. There is very little difference in the area of paved streets in this drainage area now as compared to July, 1922. It is practically the same now as it was then, in designing the new drainage system. The fact of the increased rainfall in the last few years caused me to change the basis of my calculation. I have increased the capacity about double. I do not say that the rainfall has increased that much, but I am designing for the future and not for today. I don't know what the condition of Jacobs Run was in 1922, and I am unable to say whether at the time it was adequate to take care of the water."

The court below correctly charged the law of negligence and proximate cause.

An assignment of error to the following excerpt from the charge cannot be sustained: "The court charges you that where a municipal corporation constructs and controls the sewers or drains solely, and they, by reason of their insufficient size or condition of use, clearly demonstrated by experience, result under ordinary conditions, in overflowing the private property of an adjoining or connecting owner, that the principle of exemption from liability for defect or want of efficiency of plan does not extend to such a case, and if you should find from the evidence and by its greater weight that experience had demonstrated that these sewers or drains were insufficient to carry off the water, and by reason of such insufficiency water was backed or thrown onto the premises of the plaintiff and resulted in injury, you will answer the first issue, Yes."

In Dillon on Municipal Corporations, 5th ed., Vol. 4, sec. 1739, the principle is laid down as follows: "We now add that the later cases tend strongly to establish, and may, we think, be said to establish, and in our judgment rightly to establish, that a city may be liable on the ground of negligence in respect of public sewers, solely constructed and controlled by it, where by reason of their insufficient size, clearly demonstrated by experience, they result under ordinary conditions in overflowing the private property of adjoining or connecting owners with sewage, and that the principle of exemption from liability for defect or want of efficiency of plan does not, as more fully stated below (secs. 1745, 1746), extend to such a case." See Dillon, *supra,* sec. 1731 to 1746, inclusive; *Chalkley v. City of Richmond,* 88 Va., 402, 29 Am. State Reports, p. 730, and notes.

An assignment of error to the following excerpt from the charge cannot be sustained: "The court further charges you that while municipal authorities may pave and grade their streets and are not ordinarily liable for an increase of surface water naturally falling on the lands of a private owner, where the work is properly done, they are not allowed, from this or other cause, to concentrate and gather such waters into artificial drains and throw them on the lands of an individual owner in such manner and volume as to cause substantial injury to the same and without making adequate provision for its proper outflow, unless compensation is made, and for breach of duty in this respect an action will lie, and if you find from the evidence, and by its greater weight, that, in the construction of the drain and the paving of the city's streets, it did not provide an adequate system of drainage for the proper outflow of such water as may have been collected and directed through plaintiff's property, or if you find that, even though the system was properly constructed, it was not properly maintained; or the city negligently permitted trash and other things to obstruct the flow of water into the manhole, and that forced a large quantity of water upon the property of the plaintiff, causing his damages, you will answer the first issue, Yes."

The first part of this instruction is taken *verbatim* from *Yowmans v. Hendersonville,* 175 N. C., p. 574, at p. 578; *Eller v. City of Greensboro,* 190 N. C., 715. We think both of the above cases sustain the charge, and in both cases text-books and numerous authorities are cited that sustain the charge.

The defendant requested the court to give the following instructions, which was done: "It is not sufficient to show that in grading and paving its streets, the city diverted upon the plaintiff's property more water than would naturally flow there; because in regard to the flow and disposal of surface water incident to the grading and paving of streets, a city acting under legislative authority is not ordinarily responsible for the increase in the flow of water upon abutting owners, unless there has been negligence on their part, and such negligence is the proximate cause of the damage complained of. So, that in this case, the burden is upon the plaintiff to establish by the greater weight of the evidence, (a) that his property has been damaged in the manner alleged in the complaint; (b) that the city was careless and negligent in the manner in which it paved the streets, or in which is constructed and maintained the traps and drains, or in some other particular; (c) that such negligence on the part of the city was the proximate cause of the plaintiff's damage. If the plaintiff has so satisfied you by the greater weight of the evidence, you would answer the first issue, Yes; otherwise you would answer it No.

If at the time these streets were graded and paved and drains constructed the city, in the exercise of due and reasonable care under the conditions then existing, made adequate provisions for the flow and disposal of surface water under all ordinary rains and storms likely to occur, and the damage to the plaintiff's property was caused by unusual or excessive rain or rains, which in the exercise of due care and caution, the city could not have foreseen or provided for, then the plaintiff would not be entitled to recover, and you should answer the first issue No. If, at the time these streets were graded and paved and drains constructed, the city, in the exercise of due and reasonable care under the conditions then existing, made adequate provision for the flow and disposal of surface water, under all ordinary rains and storms likely to occur, and the damage to the plaintiff's property was caused by the plaintiff's own negligence, in the manner in which the concrete floor of the garage was constructed and maintained, if you should find that the same was negligently constructed and maintained, or, on account of the negligent manner in which the plaintiff constructed the south wall of the building, if you should find that the same was constructed in a negligent manner, or, on account of the negligent manner in which the plaintiff or his lessee permitted the same traps to be obstructed, if you should find the same were so negligently obstructed, the plaintiff in either of those events would not be entitled to recover, and if you so find, you should answer the first issue No."

The charge was more favorable than the defendant was entitled to, as follows: "The city could not have foreseen or provided for." In *Hudson v. R. R.*, 176 N. C., p. 492, "That it is not required that the particular injury should be foreseen and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act." *Ellis v. Power Co.*, 193 N. C., p. 357.

The assignments of error as to the issues submitted and the refusal to give those tendered by defendant, cannot be sustained. The case was tried out on the theory of actionable negligence and the charge on negligence and proximate cause was clearly given. Nor can the assignment of error as to the admission of certain evidence—it put the city, at least, on notice—in any event it was not prejudicial. We see no prejudicial error in the charge and it comes up to the requirements of C. S., 564. The charge must be considered as a whole, and taking the prayers given at the request of defendant, we think the court below, under all the facts set forth the contentions properly and the law applicable to the facts. Although the plaintiff may not in detail have set forth in his complaint how defendant negligently constructed, maintained and operated the drains, etc., no bill of particulars nor motion to make complaint more definite and certain were requested. *Power Co. v. Elizabeth City*, 188 N. C., p. 279. It was in evidence that for years the place owned by plaintiff had been flooded and many times each year. This was known to defendant; its courthouse with its officials was in sight. It knew, or in the exercise of due care ought to have known, this fact. Yet it allowed this flooding to go until on 25 July, 1922, the water, in the language of the witness, "Washed right through like a river," the wall collapsed and "fell completely from top to the bottom." The evidence, if not direct, was circumstantial that the drains, catch-basins, etc., were too small or improperly constructed, or not sufficient in number and the drainage system was wholly inadequate.

Without objection, the city engineer testified, on cross-examination, that after making an investigation of Jacobs Run it was necessary for the city to provide other means of drainage. A cement culvert was constructed from the river to relieve the water in this drainage area. This "new storm sewer," as it was called on the map in evidence, is 54 inches at the river and runs up Market Street, cuts across Third Street and makes connection with the Jacobs Run 36-inch pipe. The new pipe at this location is a 48-inch pipe. The new storm sewer has about twice the carrying capacity of Jacobs Run system. The jury were entitled to consider all this evidence in arriving at a verdict.

Speaking to the subject Dillon, *supra,* p. 3037, says: "Under the general power to grade and improve streets or construct public improvements beneficial to it, cannot deprive others of their legal rights in respect of the watercourse or injure the property of others by badly constructed and insufficient culverts or passageways obstructing the free flow of the water without being liable therefor."

The line of demarcation sometimes is not easily drawn between municipal agencies acting in their governmental, legislative or judicial capacity or otherwise—ministerial or administrative. The direct and circumstantial evidence tended to show that in heavy but not unusual rains, that defendant in the construction of its drainage system in the particular area did so in such a negligent and unlawful manner that water was collected in large and excessive quantities. That the natural flow of the water on account of the lack of sufficient drains, etc., ponded in front of plaintiff's place of business. That when the streets were hardsurfaced by defendant the natural watercourse was substantially affected, the soil absorption eliminated and the flow accelerated over the hardsurfaced streets to artificial drains insufficient and inadequate to carry the water off. The topography of the area of land was such that the system constructed by the defendant was wholly inadequate and insufficient. In consequence, the free flow of water was obstructed and impeded, and large and excessive volume of waters were collected and ponded and thrown on plaintiff's land repeatedly so as to cause a positive and direct invasion of plaintiff's property and causing substantial injury. Plaintiff had no control over this drainage and was dependent on the defendant to protect his property from negligent construction, maintenance and operation of its drainage system in the area. Plaintiff had no legal right or authority to attempt to or remedy this condition that so interfered with the use of his property, and in consequence it became almost a continuing trespass or nuisance. Plaintiff and his lessee for years had tried to keep the accumulated water out of the place of business, but at last the water from the negligent congestion, impeded by insufficient drains, inadequate construction, etc., emptied on plaintiff's property and ultimately caused a collapse of the building and injury to the personal property therein. Only then did defendant remedy the inadequate and insufficient drainage system by making the capacity double what it was before. The evidence was plenary to be submitted to a jury. We can find in law

No error.

STATE v. HECTOR GRAHAM.

(Filed 2 November, 1927.)

1. **Courts—Constitutional Law—Statutes—Emergency Judges—Governor—Commission—Issues.**

While our Constitution, Art. IV, sec. 11, provides for the appointment of emergency or special judges by statute, and our statute confers the power of their appointment upon the Governor under the restrictions of the Constitution that it may be done when the judge assigned thereto, by reason of sickness, disability or other cause, is unable to attend and hold the court, and when no other judge is available, the validity of the trial for a homicide during the designated term may not be questioned by the defendant upon his affidavit filed subsequent to the trial, raising an issue as to whether the resident judge of the district was available at the time of the trial.

2. **Same—Appeal and Error.**

Where the prisoner tried for the commission of the capital offense of murder at a term of court held by an emergency or special judge appointed by the Governor under the provisions of our statute, has attempted to raise an issue as to the validity of the trial by reason of the availability of the resident judge to hold the term, by affidavit made by him for the first time after his conviction, no question of law or legal inference is raised as to matters of error upon the trial itself, which comes within the power conferred by our Constitution, Art. IV, sec. 8.

3. **Same—De Jure—De Facto.**

Where the emergency or special judge holds a term of court under commission from the Governor, pursuant to constitutional and statutory authority, he is in the exercise of his office as a matter of right.

4. Homicide—Murder—Evidence—Premeditation—Criminal Law.

Upon the trial for the commission of the capital offense of murder, where there is evidence that the prisoner killed the deceased by shooting him with a pistol, testimony that he had told the witness ten days before the killing that "he was going to get even with" the deceased is competent upon the question of premeditation or deliberation that would make the offense murder in the first degree.

5. Criminal Law—Husband and Wife—Evidence of Wife.

While in a criminal action against her husband the wife may not testify against him, her remarks made to him shortly before the commission of the crime, in the presence of third parties, tending to show his guilt, and not replied to by him, may be testified to by a party hearing it and being present at the time.

6. Homicide—Flight—Escape—Evidence.

The flight and concealment of the prisoner after a homicide he has committed, is a circumstance to be considered by the jury as evidence of his guilt, when properly excluded by the judge as evidence of premeditation or deliberation required for a conviction of the capital felony of murder in the first degree.

7. Instructions—Statutes.

An instruction meets the requirements of C. S., 564, to state the evidence in a plain and correct manner and declare and explain the law arising thereon, when it clearly applies the law to the evidence introduced upon the trial, gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts, and the complaining party should call to the attention of the court the minor and relevant matters of evidence when an opportunity is afforded them that may tend to influence a verdict in their favor and bring the question up on an appeal from an overruled exception duly entered.

8. Homicide—Murder—Capital Felony—Evidence—Verdict—Appeal and Error.

Held, upon this trial for a capital felony, the evidence was sufficient to sustain a verdict of guilty of murder in the first degree.

CRIMINAL ACTION, tried before *N. A. Townsend, Special Judge,* and a jury at August Term, 1927, of HOKE.

The prisoner was indicted for the murder of Paul W. Johnson and was convicted of murder in the first degree. From sentence of death he appealed, assigning exceptions, which appear in the opinion.

The deceased lived in Raeford and had a farm in the county six or seven miles distant. The homicide occurred at the farm about 2 p.m., 12 August, 1927. F. P. Johnson, brother of the deceased, had a grist mill which was not very far from the prisoner's house. Early in the morning on the day of the homicide the prisoner saw the deceased at the mill and went from the mill to Curtis's, thence to Gillis's in Cumberland, then back to Curtis's to get his wife, who had been there since Thursday. Meantime the deceased had returned to his farm. The prisoner and his wife on their return from the Curtis place were traveling in a two-seated open car. In going home they went by the farm where the deceased and Sam Stewart were doing some work about the barn. There the roads crossed, and the prisoner turned from the Puppy Creek Road into the Mail Road, stopped his car, and called to the deceased. As to subsequent events there is sharp conflict in the evidence. Henry Ray, who lived 100 yards away, testified for the State: "About 2 o'clock I was in the porch and I saw the car drive up there and turn off right there and stop. I looked down the road and I saw Mr. Paul Johnson come up to the car. He came up there, and he put his foot upon the running board and he talked to who was in there, but mind you I didn't know it was Hector Graham. He talked a few minutes about as long as I have been sitting here, I guess, and he took his foot off the running board and he sort of turned away—he was this way (illustrating), and he turned away, and I think they were done talking, and by this time the shooting took place, and Mr. Johnson turned, stumbled over that way, and he went over that way, and the car pulled out, and he went back there a few steps and he fell. I know he just fell—about the length of himself he fell—I think that. I heard two shots. When the shots were fired Mr. Johnson wasn't anywhere from the automobile. He had just passed the hind end of the car, going that way. The car was going that way, and he hadn't turned far enough from the car to be anyways from it. He hadn't been far from it; he hadn't been nowhere from it. He hadn't went nowhere from it; he didn't have time to go nowhere from it. Mr. Johnson went back that way as far as he did go. I don't know how he got down there, whether he just fell that far or whether he walked a little bit before he did fall. After a short while, I went up there to see where he was. He had disappeared out of my sight, and I went up there to see what, if I could discover where he was, and I seen him prostrated in the road there. He was just lying there, and I couldn't tell what condition he was in because I didn't have any reason to trouble unless some one with authority, like the doctor, to put hands to him or nothing at all. I discovered though that he was dead. There wasn't any fussing or loud talking or anything like that. There was not any fight of any kind. This was an open car. Had a top on it, but I don't recall whether it was a one or two-seated car. Just whenever the pistol shot then the automobile pulled out. The engine of that car stopped running when he stopped there."

Alice Campbell, a witness for the State, said: "I live on Raeford Road on the right side, going from Raeford, left side coming from Fayetteville. That is what is known as Raeford Puppy Creek Road. House is just short distance from road. I was home on 12 August, 1927. Was there about 2 o'clock. I saw Hector Graham and his wife pass there in an automobile. Hector was sitting on side of car next to my house. His wife on other side. Hector was driving. I was sitting on front piazza, just below my door, *i. e.,* on side next to Raeford. I saw Mr. Johnson. He was at the lot. I knew he was in the lot, but I did not know at what point. I saw him when he was called out from the lot. Hector called him. He had just stopped. Car turned a little into the other road, but stopped. The engine of car was somewhere about the stump. I could not see driver of car when it stopped. I could see the other person in front sitting. The other person was Hector's wife. I could hear the engine of car to the house. If the engine of car stopped, I did not pay any attention to it. Hector called Mr. Johnson. I heard the Paul part; I don't know whether he Mr.'d him or not. Mr. Johnson went to car when Hector called. Mr. Johnson had his hands in his pockets. He went up the Mail Road to car. When he went up to car he put his foot on running board. I could see his shoulders. Could not see any part of him except his shoulders. I did not see anything happen. The next thing I heard happen, I heard pistol fire, and right after the pistol fired there was a little racket made, a noise like a child, and then another pistol fired; it was just all done right at once, almost. Pistol was fired at car. I could see Hector's wife all the time. I could not see her move. I could have seen her if she would have moved. I don't know whether Hector's wife shot pistol or not, but I did not see her move. Mr. Johnson came running, staggering back around the car and fell. Mr. Johnson wasn't at car any time before shot was fired—just a few minutes. I never could estimate time. There was nothing between car and my house to obstruct the view. Car drove off immediately after pistol fired; car was going when Mr. Johnson fell. I never heard any fussing at car. I never saw any fight. I never saw Mr. Johnson move from the position he was in at car until pistol fired. He was there, looking right at the car and them."

The prisoner testified in part as follows: "I knew Mr. Paul Johnson all his life. I know all of the family. I worked with his father. I had known Mr. Paul 27 or 28 years. Mr. Paul Johnson and me, nor any of his family, ever had any trouble. I never had any ill-feeling towards him or any of his family. I saw Mr. Paul Johnson on 12 August. I first saw him on that day at Mr. Fred Johnson's mill, early that morning. . . . I left Mr. Curtis's to go home, and going from Mr. Curtis's to my home I must travel the Puppy Creek Road to the crossing of the Mail Road at Mr. Johnson's place, turn in at the Mail Road to go to my house. I did not know that Mr. Paul Johnson was at the farm until I got there. I did not expect to see him at all. When I saw Mr. Paul at the barn, I stopped to see if I could get some work from him and see if he wanted some corn. I had sold Mr. Fred sixteen to seventeen bushels of corn and I wanted to sell some more corn. When I saw Mr. Paul at the barn I stopped and called (Hey, Mr. Paul), and he came to the car immediately. He walked up on the left side of the car where I was sitting. My wife had a bag in the car, and when he came up to the car he asked what was in that bag. My wife replied, 'I have been off working.' I had a walking stick in the car between the back of front seat and coat rack. Mr. Paul grabbed the stick and said, 'I will learn you how to call me Paul ....' Mr. Paul took the stick and began hitting me. He struck me side of the face and on the back of the head, and I grabbed the pistol and shot him. The reason I had the stick, I had hurt my foot and had been using the stick for a walking stick." Stick produced in court and identified as the stick Mr. Johnson had hit him with. Stick seasoned dogwood, about the usual size of a walking stick. "It was not broken before Mr. Paul struck me with it. He struck me right there, on that bone (indicating cheek bone), and made that big scar and he hit my head up there and up there (indicating about the head). I shot him while he was beating me. I wouldn't have done it for nothing. I was just knocked addled."

Q. Why did you shoot Mr. Johnson? A. "I don't know. I just naturally was addled. He knocked me and assaulted me with the stick, and I hardly knew what I was doing, and then whenever he hit me he knocked every bit of the water in me out."

Q. Did you stop there for the purpose of having any fight or altercation with Mr. Johnson? A. "Not a bit in the world. I never did have no difficulty; I liked them all. I never did have no trouble with none of them at all. That is the truth. I always liked them all. I worked with them all. When I left there I went home. It's a wonder I did not tear up the car going home. I didn't know what I was doing; I was hurting so bad. I did not stay at home no longer than to open the door and get out. I went to Fayetteville on Monday morning and surrendered to Sheriff McGeachy. I tried to make my way there before, but could not get there. A colored man by the name of Bell, who lives about nine miles from Fayetteville, carried me to Fayetteville. I went to his house and asked him to carry me to Raleigh or Fayetteville so I could surrender, and he carried me to Fayetteville. When I surrendered to Sheriff McGeachy my face and eye were swollen, and the sore and bruises were on my face where Mr. Johnson struck me. The skin was broken." Witness at this time shows scar across his cheek bone to the jury. Scar about two and one-half inches long, straight across the cheek bone.

Laura Graham, the prisoner's wife, testified: "I was at Mr. Curtis's 12 August. Was there to help wait on his wife. My husband came there that day. I left there with him. When we left there we went down the highway leading towards Raeford and turned and detoured and came around by Mr. Johnson's mill, and Mr. Paul Johnson's farm. That was the only way we could travel going home. The main highway was under construction. I saw my husband when he came to Mr. Curtis's. He was driving a car. Did not see him have any pistol. While he was there did not say anything to him about having broken into my trunk and getting a pistol. Only thing I said to him, 'I will be ready in a few minutes.' We then left there as soon as I could lay the baby down and give the lady some milk. In going from there home we would go by Mr. Johnson's farm. Saw Mr. Johnson when we passed the farm. He was at the shelter when I first saw him. My husband stopped the car and called Mr. Johnson. Mr. Johnson came to car on left side. My husband did not say anything to Mr. Johnson as he came to car. When Mr. Johnson walked up to the car, he reached over and looked into the car, and said, 'What is in that bag there?' and I just said it was my bag where I had been off on some work. Mr. Johnson then says to my husband, 'Did you call me Paul?' and Hector replied, 'Yes, sir, I did; isn't that your name?' Mr. Johnson says, 'You ...., don't you ever call me Paul any more,' and he grabbed the stick out of the car and struck him. This is the stick that he struck him with. The stick was standing behind the seat in the coat rack. Don't know how many times he struck him. It frightened me so, I threw up my hand and began crying. Was not looking at my husband when he shot him. I heard the shots; could not say how many, I was so frightened. The licks and shooting occurred at the same time. As soon as shooting occurred my husband drove off immediately. Didn't know when we left there how badly Johnson was hurt. We went direct home. Did not hear my husband make any statement about Mr. Johnson that day. Have never heard him make any threats against him. He always spoke nice about him to me. I did not know of any trouble between my husband and Mr. Johnson."

Dr. G. W. Brown, the coroner, testified that he had examined the body of the deceased and had found two wounds—one in the left hand, indicating powder burn, and the other between the second and third ribs half an inch above the base of the heart. Both were pistol wounds, and the latter was fatal. The deceased died instantly.

The evidence is voluminous, but the foregoing is sufficient to give the background of the legal propositions referred to in the charge. Other evidence is set out in the opinion. Testimony offered in corroboration, or in support or disparagement of character is omitted.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Robinson, Downing & Downing for prisoner.

ADAMS, J. In the outset of his argument the prisoner impeaches the legal sufficiency of the verdict and judgment on the ground that the trial court was without jurisdiction to hear and determine the question of his guilt. The position is predicated on Article IV, sec. 11, of the Constitution. It is therein provided that the General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county or district when the judge assigned thereto, by reason of sickness, disability or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same, and that such special or emergency judges shall have the power and authority of regular judges of the Superior Courts, in the courts which they are appointed to hold. Accordingly, the General Assembly at the session of 1927 passed an act authorizing the Governor to appoint four special judges, two from the Eastern and two from the Western Judicial Division, whose term should begin 1 May, 1927, and end 30 June, 1929. Judge Townsend was appointed one of the special judges from the Eastern Division and was thereby vested with "all the jurisdiction which is now or may be hereafter lawfully exercised by the regular judges of the Superior Courts which they are appointed or assigned by the Governor to hold." Public Laws 1927, ch. 206. On 5 May, 1927, Governor McLean assigned Judge Townsend to hold the term at which the prisoner was tried, reciting in the commission that "by reason of sickness, disability, or other cause, the regular judge assigned to hold said term is unable to attend and hold the same."

We find in the record a certificate, dated about a month after the trial had been concluded, that the resident judge had been "available to hold the court." This Court has jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference (Const., Art. IV, sec. 8); but it cannot consider a paper which, unrelated to the trial, purports upon its face to have raised an issue of fact after the adjournment as to the recitals set forth in the commission given the presiding judge.

At no time during his trial did the prisoner assail the validity of the commission; his challenge first appears in his assignments of error. In *S. v. Hall,* 142 N. C., 710, 713, it is said that jurisdiction is never applied to any question touching the existence of the court itself and is not conferred until the court designated to exercise it has been brought into being according to the mode prescribed by law. If it be granted that the prisoner intended to say, not that the court, if legally organized, had no jurisdiction of the crime, but that it was called and organized without authority of law, his position is none the more favorable. In holding the court Judge Townsend served in the capacity of a judge *de jure;* pursuant to constitutional and statutory authority he was in the exercise of his office as a matter of right. But if he had been judge *de facto* as defined in *S. v. Lewis,* 107 N. C., 967, his duties, discharged under color of a valid appointment, would have been conclusive, not as to the State perhaps (33 C. J., 971, sec. 101), but as to the public and the rights of third parties. In *People v. Staton,* 73 N. C., 546, the Court observed, "And we think it may now be considered as settled by our own decisions and by the English and American cases and by the text-writers, that there is no difference between the acts of *de factor* and *de jure* officers so far as the public and third persons are concerned." The result is that in any view of the case the prisoner's first exception must be overruled. *Burke v. Elliott,* 26 N. C., 355; *Gilliam v. Riddick, ibid.,* 368; *S. v. Speaks,* 95 N. C., 689; *S. v. Turner,* 119 N. C., 841; *S. v. Hall, supra; S. v. Wood,* 175 N. C., 809; *S. v. Montague,* 190 N. C., 841.

The second exception relates to the testimony of the witness Evers. He said that about ten days before the homicide the prisoner had told him that the deceased "had had some talk about him, and he was going to get even with him." It is contended for the defense that these words do not import malice, and that without them there is no evidence of such malice as tends to establish premeditation and deliberation. The prisoner's declaration was in the nature of a threat; hence the testimony was not incompetent. In *S. v. Foster,* 130 N. C., 666, evidence of a threat made a month before the homicide was held admissible as tending to show malice and as "some evidence" of premeditation and deliberation. If the evidence was competent for any purpose there would have been error in excluding it. *S. v. Burton,* 172 N. C., 939; *S. v. Johnson,* 176 N. C., 722; *S. v. Baity,* 180 N. C., 722; *S. v. Vaughan,* 186 N. C., 759.

Mrs. Doss Bowen was permitted to testify that a short time before the homicide the prisoner took a pistol from his pocket in her presence and in the presence of his wife, whereupon the latter addressing her husband remarked, "You broke in my trunk and got it." This was objected to; but the objection was properly overruled. Although the wife is not a competent witness against the husband in the trial of a criminal action, her declarations made in his presence, and in the presence of a third party, and naturally calling for some action or reply if untrue, he remaining silent, are admissible in evidence. *S. v. Record,* 151 N. C., 695; *S. v. Randall,* 170 N. C., 757, 762; *S. v. McKinney,* 175 N. C., 784; *S. v. Evans,* 189 N. C., 233. It is suggested that without regard to this principle the wife's statement had no reference to the homicide and was made, if at all, before the commission of the crime. The evidence was competent in that it tended to show the prisoner's possession of the pistol a short while before he came to the farm and called the deceased to the car, for at this time the prisoner had not testified or admitted the homicide.

The deceased was killed about 2 o'clock on Friday; on Monday morning the prisoner surrendered himself to the sheriff of Cumberland County. The State offered evidence to show that search had been made for the prisoner immediately after the death, and thereafter without break until the first of the next week. The purpose was to show flight, and flight is a circumstance to be laid before the jury as having a tendency to prove guilt, although as his Honor correctly instructed the jury, it is not evidence of premeditation or deliberation. *S. v. Foster, supra; S. v. Tate,* 161 N. C., 280. Fruitless search may be shown by laymen as well as by officers of the law.

It is urged for error that his Honor failed to state the evidence in a plain and correct manner and to declare and explain the law arising thereon. C. S., 564. In reference to the first of these clauses it may be said that recapitulation of all the evidence is not demanded and that the requirements of the statute in this respect are met by presentation of the principal features of the evidence relied on respectively by the prosecution and the defense. An omission from the charge of an important feature of the evidence should be called to the attention of the court before the verdict is returned. This opportunity was given the prisoner's counsel, the judge inquiring near the close of the charge whether he had overlooked any of the contentions. Only one was suggested, and it was submitted to the jury. *S. v. Grady,* 83 N. C., 643; *S. v. Pritchett,* 106 N. C., 667; *Boon v. Murphy,* 108 N. C., 187; *S. v. Ussery,* 118 N. C., 1177.

Concerning the necessity of declaring and explaining the law it has been held in quite a number of cases that nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts. We adhere to the well settled principle so clearly enunciated in *Merrick's* *case* that a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising from the evidence; and we would not hesitate to declare any material departure therefrom substantial cause for a new trial. *S. v. Merrick,* 171 N. C., 788, 795. But we have not discovered in this case any such disregard of the statute as calls for the application of this salutary doctrine.

The seventh and eighth exceptions are so obviously untenable as to require no comment; as to the ninth we find no evidence to which the doctrine of cooling time should have been applied; and in the instruction as to retreating to avoid a menaced encounter we have found no error of which the prisoner can reasonably complain. The eleventh and twelfth exceptions also are without substantial merit. In the recital of the prisoner's contentions the cause he assigned for his conduct after the homicide and for leaving home was clearly stated. If there was error in setting out the contentions which are the subject of the thirteenth, fourteenth and fifteenth exceptions, it should have been pointed out when corrections of this character were requested by the court. *S. v. Ashburn,* 187 N. C., 717; *S. v. Reagan,* 185 N. C., 710; *S. v. Little,* 174 N. C., 800.

The exception last to be considered was taken to the court's refusal to withdraw from the jury the question of murder in the first degree. It is argued that there was no evidence of premeditation and deliberation; but we cannot concur. The evidence of self-defense was at least subject to doubt. The prisoner said that when he arrived at the farm the stick with which the deceased assaulted him was "in the car between the back of the front seat and the coat rack." His wife testified: "I did not see the stick any more after the shooting until after I got home. Next time I saw it, it was between the coat rack and the seat, the same place it was before the shooting." This, and evidence of the threat, of the way in which the pistol had been procured, and of circumstances explained by two eye-witnesses, if believed by the jury, formed a sequence of incidents fully warranting the finding that the death of the deceased was the result of a preconceived purpose. *S. v. McCormac,* 116 N. C., 1036; *S. v. Dowden,* 118 N. C., 1145; *S. v. Daniels,* 164 N. C., 464; *S. v. Lovelace,* 178 N. C., 762.

In reviewing the several assignments of error we have not been inadvertent to the gravity of the judgment. In the interest of human life we have examined the exceptions, the evidence, the instructions, the entire record, and we are unable to see wherein the prisoner has just and legal ground for demanding a new trial.

No error.

J. B. RICHARDSON v. SOUTHERN SURETY COMPANY.

(Filed 2 November, 1927.)

Master and Servant—Employer and Employee—Negligence—Evidence—Nonsuit.

Where there was evidence that the plaintiff was employed to load rock in a field for the construction of a highway, requiring the bursting of a rock with a sledge hammer when too large for loading, and that the injury in suit was caused by a particle of stone flying into his eye from the stroke of the hammer upon the rock, it is insufficient evidence of the employer's negligence that he failed to furnish the plaintiff with goggles to have protected his eye, nothing else appearing.

APPEAL by plaintiff from *Finley, J.,* at April Term, 1927, of ASHE. Affirmed.

Action to recover damages for personal injuries sustained by plaintiff while at work as an employee of defendant.

From judgment dismissing the action as upon nonsuit, at the close of the evidence, plaintiff appealed to the Supreme Court.

T. C. Bowie and C. W. Higgins for plaintiff.
Ruark & Fletcher and C. H. Gover for defendant.

PER CURIAM. Plaintiff, an employee of defendant, was engaged in loading rock, in a field, to be hauled to and used in the construction of a highway. Some of the rocks were too large to be loaded. Plaintiff was instructed by his foreman to burst these large rocks with a sledge hammer furnished him for that purpose. While bursting a large rock with this hammer, a piece of the rock flew up and hit him in the eye, injuring it.

Plaintiff alleged that defendant failed to furnish him with goggles or wire screens, to be used while bursting the rocks, for the protection of his eyes, and that such failure was negligence, causing his injury. Upon the facts of this case it cannot be held that it was the duty of defendant to furnish such goggles or wire-screens to plaintiff for his protection while engaged in the work for which he was employed. Plaintiff's injury, upon all the evidence, was due to an accident, and was not caused by any negligence of defendant. The judgment dismissing the action is sustained by *Whitt v. Rand,* 187 N. C., 805, and by *Fore v. Geary,* 191 N. C., 90. The judgment is

Affirmed.

R. L. HOLMES, ADMINISTRATOR OF ROBERT L. HOLMES, JR., DECEASED, v. C. R. WHARTON.

(Filed 9 November, 1927.)

1. **Courts—Clerks of Court—Jurisdiction—Executors and Administrators —Judgments—Collateral Attack.**

Except when the clerk of the Superior Court having jurisdiction of the issuance of letters of administration issues them, when the party is not dead, no jurisdictional fact is raised, and where he has found as a fact before issuing the letters that he died domiciled in his county according to the statute, C. S., 1(1), the fact of his domicile cannot be collaterally assailed.

2. **Same—Actions—Automobiles—Negligence.**

Where the plaintiff sues to recover damages caused by the negligent driving of defendant's automobile on a highway, declarations of the deceased tending to show that his death was caused by defects in the auto truck he was driving at the time and not by the negligent driving of defendant's automobile, are incompetent as *pars res gestæ*, when made after the injury was received by him which caused his death.

3. **Same—Trusts—Evidence—Declarations Against Interest.**

Where an administrator sues to recover damages for the wrongful death of his intestate, he acts in the nature of a trustee for those among whom the recovery is to be distributed under our statute, and the declarations of the deceased are not competent as admissions against interest, as he, being dead, can have no interest therein.

4. **Evidence—Dying Declarations—Statutes.**

Dying declarations to be competent must be based upon the establishment of certain preliminary facts, and otherwise they are inadmissible as hearsay. C. S., 160. *S. v. Franklin,* 192 N. C., 723.

APPEAL by defendant from *Midyette, J.,* at Second May Term, 1927, of ALAMANCE. No error.

Action to recover damages resulting from the death of plaintiff's intestate, alleged to have been caused by the negligent operation of an automobile by defendant on the State Highway in Rockingham County.

The issues were answered as follows:

1. Is the plaintiff the legal administrator of Robert L. Holmes, Jr., as alleged in the complaint? Answer: Yes.

2. Was the plaintiff's intestate injured and killed by the negligence of defendant, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff's intestate by his own negligence contribute to his own injury and death, as alleged in the answer? Answer: No.

4. What damages, if any, is the plaintiff entitled to recover of the defendant by reason of the injury and death of plaintiff's intestate? Answer: $10,000.

From judgment in accordance with the verdict, defendant appealed to the Supreme Court.

D. F. Mayberry, J. Dolph Long, Brooks, Parker, Smith & Wharton and W. H. Holderness for plaintiff.

Glidewell, Dunn & Gwynn and King, Sapp & King for defendant.

CONNOR, J. Defendant in his answer denies the allegation in the complaint that plaintiff is the lawfully appointed and legally qualified administrator of the deceased, Robert L. Holmes, Jr. He alleges that at the time of his death, deceased was domiciled in Rockingham and not in Alamance County. He contends that the appointment of plaintiff as administrator of Robert L. Holmes, Jr., deceased, by the clerk of the Superior Court of Alamance County was void, for that said deceased was not at or immediately previous to his death, domiciled in Alamance County. C. S., 1, subsec. 1.

Upon the issue thus raised by the pleadings, and submitted to the jury at the trial, plaintiff offered as evidence the record in the office of the clerk of the Superior Court of Alamance County of the appointment and qualification of plaintiff as administrator of his intestate. It appears from said record that it was satisfactorily proven to said clerk that Robert L. Holmes, Jr., late of Alamance County, is dead, and that Robert L. Holmes, plaintiff herein, is entitled to the administration of the estate of the deceased. Upon the qualification of plaintiff as administrator, according to law, pursuant to his appointment, the letters of administration, which were offered in evidence by the plaintiff, were duly issued to him.

The foregoing record and letters of administration were proven by the clerk of the Superior Court of Alamance County, who testified as a witness for plaintiff with respect thereto. Upon his cross-examination of this witness defendant undertook to show that at the time of his death the deceased was not domiciled in Alamance County. Plaintiff objected to all questions addressed to the witness for the purpose of attacking the validity of the letters of administration. These objections were sustained and defendant excepted. In response to questions addressed to them by the court, defendant's counsel stated that it was their purpose during the progress of the trial of this action to attack the validity of the letters of administration, issued to the plaintiff by the clerk of the Superior Court of Alamance County, upon the ground that said letters, and the order pursuant to which they were issued, were void, for that deceased, at the time of his death, was not domiciled in said county, and that the clerk of the Superior Court of said county, for that reason, was without jurisdiction. The court thereupon announced that he would rule that evidence to that effect was incompetent, and that same would be excluded. Defendant excepted to this ruling, and in deference thereto offered no evidence with respect to the domicile of the deceased at and immediately preceding his death.

Defendant's first assignment of error upon his appeal to this Court is based upon his exceptions to the refusal of the court to permit him to offer evidence that at his death plaintiff's intestate was not domiciled in Alamance County, and thus to attack collaterally, in this action, the validity of plaintiff's appointment and qualifications as administrator of deceased. This assignment of error cannot be sustained. The ruling of the court upon the trial is sustained by the decision of this Court in *Tyer v. Lumber Co.,* 188 N. C., 274, in which it is held that jurisdiction with respect to the appointment of an administrator of a deceased person, when once acquired, cannot be collaterally impeached. In support of this decision *Batchelor v. Overton,* 158 N. C., 396, is cited in the opinion written by *Adams, J.* In that case *Fann v. R. R.,* 155 N. C., 136, is cited with approval. In the latter case *Hoke, J.,* writing for the Court, says: "In this day and time, and under our present system, it seems to be generally conceded that the decrees of probate courts, when acting within the scope of their powers, should be considered and dealt with as orders and decrees of courts of general jurisdiction, and where jurisdiction over the subject-matter of inquiry has been properly acquired that these orders and decrees are not as a rule subject to collateral attack. The facts very generally recognized as jurisdictional are stated in Revisal 16 (now C. S., Art. I, sec. 1) to be that there must be a decedent; that he died domiciled in the county of the clerk where application is made, or that, having his domicile out of this State, he died out of the State, leaving assets in such county or assets have thereafter come into such county; having his domicile out of the State, he died in the county of such clerk, leaving assets anywhere in the State, or assets have thereafter come into the State, and where on application for letters of administration, these facts appear of record, the question of the qualification of the court's appointee cannot be collaterally assailed." See, also, *Wharton v. Ins. Co.,* 178 N. C., 135, and *Reynolds v. Cotton Mills,* 177 N. C., 412.

In the instant case, the facts upon which the clerk of the Superior Court of Alamance County acquired jurisdiction with respect to the administration of the estate of Robert L. Holmes, Jr., appear upon the record, to wit: (1) that the date of the application for letters of administration upon his estate, he was dead; and (2) that at the date of his death, or immediately previous thereto, he was domiciled in said county. These jurisdictional facts having been satisfactorily proven to the court, it exercised its statutory jurisdiction, and made the appointment and issued to its appointee letters of administration. Its jurisdiction with respect to the subject-matter cannot be impeached collaterally, except by allegation and proof that at the date of the application for letters of administration upon the estate of Robert L. Holmes, Jr., he was not dead. In that event the court would have had no jurisdiction with respect to the administration of his estate, and its appointment of plaintiff as his administrator would be void. The order making the appointment being void, could be attacked collaterally. *Clark v. Homes,* 189 N. C., 703, and cases cited in the opinion of *Varser, J.* The order appointing plaintiff as administrator of the deceased, is not subject to collateral attack, however, upon the ground that deceased was not domiciled at or immediately previous to his death in Alamance County. The finding of fact by the court, with respect to the domicile of deceased is conclusive, in this action. Such finding could be questioned only by direct attack upon the validity of the order appointing plaintiff as administrator of his intestate. The ruling of the Court is sustained by authoritative decisions of this Court and is in accord with well sustained principles. It is supported by a sound public policy.

The statute in this State with respect to probate jurisdiction presumes, of course, that the person upon whose estate letters of administration are sought, is dead at the time application for such letters is made. No court has probate jurisdiction of the estate of a living person—that is, jurisdiction to probate his will, or to grant letters testamentary or letters of administration with the will annexed, or letters of administration in cases of intestacy. Such jurisdiction, in the very nature of the case, can be exercised only when the person is dead. Therefore, the death of the person upon whose estate letters of administration are sought, is in all cases a jurisdictional fact, in the absence of which no court can make a valid order with respect to the administration. Letters of administration may be attacked collaterally upon the ground that the court was without jurisdiction to issue them, for that the person alleged to be dead, at the date of the application was in fact then living.

When, however, the death of the person upon whose estate the letters were issued, is admitted or proven, the statute confers jurisdiction upon the clerks of the Superior Court of the several counties of the State. The clerk in each county, has jurisdiction in probate matters, within his county when certain facts, as set out in the statute, have been established. When these facts are found by the clerk upon application to him for the issuance of letters of administration, he proceeds at once to exercise his statutory jurisdiction. The validity of his orders, made in the exercise of such jurisdiction, cannot be impeached, collaterally, by evidence tending to show that the facts with respect to the domicile of the deceased, etc., are otherwise than as found by him. His jurisdiction in so far as it is dependent upon the facts set out in the statute, is conclusive, unless made the subject of a direct attack by a party in interest.

Plaintiff's intestate sustained his fatal injuries when a truck which he was driving on a State highway in Rockingham County, struck a post standing on the side of the highway. Evidence offered by the plaintiff tended to show that immediately before the truck struck the post defendant, who was driving an automobile on said highway, just ahead of the truck, by his negligent operation of the automobile, caused plaintiff's intestate to swerve from the highway in order to avoid striking the automobile with the truck, thereby causing said intestate to lose control of the truck, with the result that it struck the post, thus causing his injuries and death. The evidence further tended to show that but for the act of plaintiff's intestate in swerving the truck from the hard surface of the highway, it would have struck defendant's automobile, and probably caused serious, if not fatal, injuries to defendant.

Defendant excepted to the exclusion by the court, upon plaintiff's objections, of testimony of several witnesses, to the effect that immediately after the truck struck the post, and after plaintiff's intestate had sustained his fatal injuries, he made a statement that there were no brakes on the truck, and that he had so informed his father, the plaintiff, that morning; that he was unable to control the truck because it had no brakes. Assignment of error based upon these exceptions are not sustained.

No statements of deceased with respect to the condition of the brakes on the truck, tending to show that such condition was the cause of the injuries, which he had sustained prior to the making of such statements, are admissible upon the principle of *pars rei gestæ.* Such statements, upon the facts appearing in this record, were not spontaneous declarations uttered at the time of the occurrence, but were narrative in character, made after the occurrence which had resulted in the injuries. They do not come within the exception to the rule excluding hearsay testimony as evidence. *Young v. Stewart,* 191 N. C., 297, and cases there cited.

Nor can such statements be held competent as declarations against interest. Whatever may be the holding in other jurisdictions, this Court has held in *Dowell v. City of Raleigh,* 173 N. C., 197, with respect to actions for wrongful death, that while the statute requires the personal representative of the deceased to bring action for damages for such death, he acts in such respect in the nature of a trustee for the beneficiaries under the statute, the right of action depending entirely upon the statute, operating after the death, in which decedent can have no interest; and that, therefore, the declarations of the decedent made as to the character or cause of the occurrence are inadmissible as substantive evidence.

The authorities sustaining this holding, and the principles supporting these authorities are set out and discussed by *Walker, J.,* in his opinion in *Dowell v. City of Raleigh.* This case has been cited with approval in *Avery v. Brantley,* 191 N. C., 399.

The statements of the deceased offered as evidence were not admissible as dying declarations, under C. S., 160. It does not appear that such statements were made under conditions which are required for the admission of dying declarations as an exception to the rule excluding hearsay testimony as evidence. *S. v. Franklin,* 192 N. C., 723. The dying declarations of a deceased person for whose death an action has been brought under C. S., 160, is competent as evidence, provided the preliminary facts are made to appear. *Southwell v. R. R.,* 189 N. C., 417. Otherwise they are not admissible.

We have examined the other assignments of error, relied upon by defendant upon his appeal to this Court, and discussed at length in the briefs. These assignments of error are based chiefly upon exceptions to instructions of the court in the charge to the jury, and upon exceptions to the refusal of the court to give instructions as prayed by defendant. They cannot be sustained. It is needless to discuss them *seriatim.* We find no error on the record. There was sharp conflict in the evidence pertinent to the issues which involve defendant's liability for the death of plaintiff's intestate. There was no motion for judgment as of nonsuit, and as we find no error in matters with respect to which this Court has jurisdiction, the judgment is affirmed.

No error.

BOARD OF COMMISSIONERS OF GREENE COUNTY AND J. L. EDWARDS, TREASURER, v. FIRST NATIONAL BANK OF SNOW HILL ET AL.

(Filed 9 November, 1927.)

1. Banks and Banking—Merger—Voluntary Dissolution.

When an existing bank is absorbed by another bank, it is in effect, a voluntary dissolution of the bank thus taken over.

2. Same—Statutes—Liability of Shareholders—Contracts.

The additional liabilities of a stockholder in a National bank to that ordinarily existing as to shareholders in other corporations, arises by operation of a statute at the time the stock was purchased, as secondary to the general liabilities of the bank, and not as express or implied promise to pay by contract.

3. Same—Courts—Jurisdiction—Federal Courts.

A bank organized under the Federal laws whether it has entered into liquidation voluntarily or not, is under the control of the Comptroller of the Currency of the United States, and the question of the enforcement of the additional liability of its stockholders is one falling alone within the jurisdiction of the Federal Courts.

APPEAL by defendants from *Cranmer, J.,* at February Term, 1927, of GREENE.

Plaintiffs brought suit against the First National Bank of Snow Hill, its officers, directors and stockholders for the appointment of a receiver for said bank to the end that the stockholders be assessed to the full par value of their stock for the benefit of the creditors and the depositors of the bank.

The material allegations in the complaint may be summarized as follows: (1) The First National Bank of Snow Hill was organized as a National bank with a capital of $50,000; (2) it was appointed financial agent of Greene County; (3) the county turned over to it as such agent, besides current county funds, $300,000 derived from the sale of bonds issued by the county for the purpose of building hardsurface roads; (4) the county ordered the bank to pay this amount to the State Highway Commission; (5) the bank was not able to do so, but acknowledged the State Highway Commission as its depositor to the amount of $300,000; (6) unable to pay cash it gave the commission a penal bond to make good the deposit, the sureties being of doubtful solvency; (7) afterwards the Legislature authorized the board of commissioners to receive from the commission the evidence of its deposit (P.-L. Laws 1927, ch. 426) and provided that the commission should thereupon be released and discharged; (8) the plaintiffs now own the deposit; (9) in December, 1923, or January, 1924, the First National Bank of Snow Hill was absorbed by and merged into the Bank of Greene, a State bank licensed by the Corporation Commission with a capital stock of $25,000; (10) the Bank of Greene agreed to assume and pay "all debts, depositors, and creditors of the First National Bank of Snow Hill, save and except the stock liability of the stockholders"; (11) at the time of the merger the First National Bank was insolvent and its officers, directors and stockholders effected the merger with intent to hinder, delay and defeat its creditors and depositors; and (12) the Bank of Greene is insolvent, a receiver therefor having been appointed 25 September, 1925.

The dates of various transactions are not given in the complaint, but from the act of 1927, which is referred to in the complaint, it appears that the deposit of $300,000 in the First National Bank was made by the county about 1 July, 1921, and that demand for payment was made by the commission on 29 November, 1922.

The defendants demurred to the complaint on the following grounds: (1) The complaint does not state a cause of action; (2) the Superior Court of Greene County was without jurisdiction to hear and determine the alleged cause of action; (3) if a cause of action exists it can be maintained only by the State Highway Commission; (4) if the board of commissioners had any right to or interest in the deposit in the Bank of Greene it arose out the transfer by the commission under the special act of the Legislature, and the plaintiffs have no claim against any deposit in the First National Bank of Snow Hill; (5) under the direction of the Comptroller of the Currency the First National Bank of Snow Hill was dissolved and liquidated and the plaintiffs have no enforceable claim against the bank or the defendants.

The demurrer was overruled and the defendants excepted and appealed.

George M. Lindsay for plaintiffs.
L. I. Moore and J. Paul Frizzelle for defendants.

ADAMS, J. It is alleged in the complaint that in December, 1923, or January, 1924, the First National Bank of Snow Hill, which had previously conducted a general banking business under the license and supervision of the Comptroller of the Currency, was absorbed by and merged into the Bank of Greene. This in effect is an allegation of voluntary dissolution. On 25 September, 1925, a receiver was appointed for the Bank of Greene, which was insolvent, and in June, 1926, the present action was brought in the Superior Court of Greene County to procure the appointment of a receiver for the First National Bank of Snow Hill with a view to assessing the stockholders thereof to the amount of their stock at its par value. The crucial questions are whether the Superior Court of Greene County had jurisdiction and whether the plaintiffs can maintain their action.

National banks can be organized only upon the conditions and in the mode prescribed by the acts of Congress, and when organized they are subject to the provisions of the Federal law. U. S. Compiled Statutes, 9657 *et seq.;* R. S., 5134; 12 U. S. Code Anno., sec. 22. In *McCulloch v. Maryland,* 4 Wheat., 316, 4 Law Ed., 579, *Marshall, C. J.,* elucidating the principle that the Constitution and the laws made in pursuance thereof are supreme and that they control the constitution and laws of the respective States, defined it as a principle "which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rendering it into shreds." And in *Davis v. Elmira Bank,* 161 U. S., 275, 40 Law Ed., 700, *Mr. Justice White* specifically applied the principle in these words: "National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this Court." See *Farmers, etc., Bank v. Dearing,* 91 U. S., 29, 23 Law Ed., 197; *Christopher v. Norvell,* 201 U. S., 216, 50 Law Ed., 733; 3 R. C. L., 656, sec. 287; 7 C. J., 760, sec. 585.

"The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure." U. S. Compiled Stats., 9689; 12 U. S. Code Anno., sec. 64.

If the promise raised by this statute be interpreted as a contract with the creditors to pay a sum equal to the value of the stock taken in addition to the sum invested in the shares, still it is a contract created by the statute and obligatory upon the stockholders because the statute was in force when they subscribed for the stock. It was so held in *McDonald v. Thompson,* 184 U. S., 71, 46 Law Ed., 437, the Court observing that in none of the numerous cases upon the subject was the obligation treated as an express contract of the stockholders to take and pay for the shares in the association." The statute does not mean that the stockholder makes a promise to the creditor as a surety for the debt of the corporation; it imposes a liability on him as secondary to the debts which remain distinct, and to which the stockholder is not a party. *McClaine v. Rankin,* 197 U. S., 155, 49 Law Ed., 702.

With respect to National banks liquidation is voluntary or involuntary. As to the latter it is provided that on becoming satisfied that any association has refused to pay its circulating notes as required and is in default, the Comptroller of the Currency may appoint a receiver who shall take possession of the books, records and assets of the bank, collect its claims, sell its property, and if necessary enforce the individual liability of the stockholders. U. S. Compiled Stats., 9821; R. S., 5234; 12 U. S. Code Anno., sec. 192. The original act contained no provision for enforcing such individual liability in case of voluntary liquidation; but this omission was supplied by the act of 30 June, 1876. U. S. Compiled Stats., 9807; 12 U. S. Code Anno., sec. 65. It is therein provided that when any national banking association shall have gone into voluntary liquidation the individual liability of the shareholders may be enforced by any creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

It is needless to venture a discussion of the question whether the statutory remedy is exclusive or cumulative, a question concerning which there is apparently a difference of opinion. *Williamson v. American Bank,* 115 Fed., 793, 52 C. C. A., 1; *King v. Pomeroy,* 121 Fed., 287, 58 C. C. A., 209. It results, in either event, that the present action cannot be maintained. Other grounds of the demurrer may interpose barriers which cannot be removed.

The demurrer should have been sustained and the action dismissed.

Reversed.

JAMES JEFFERSON v. CITY OF RALEIGH.

(Filed 9 November, 1927.)

1. **Master and Servant—Employer and Employee—Negligence—Safe Place to Work—Safe Instrumentalities—Evidence—Questions for Jury.**

Where the evidence is conflicting as to whether a city, in the exercise of due care, had failed to provide its employee with a safe method of cutting in two a cast-iron pipe, and such as were known, approved and in general use, but instead required him to use a heavy sledge-hammer with which to strike a chisel held by another employee for the purpose: *Held,* the city is liable for the damages directly and proximately caused to the plaintiff's eye by a fragment of the pipe flying off from the blows of the hammer, and the evidence being conflicting the question of defendant's liability is properly submitted to the jury.

2. Same—Damages.

Where the master has been negligent in providing for his servant a safe method to do the work required of him, within the scope of his employment, in the exercise of ordinary care, it is not necessary to hold the master liable, that the particular injury caused thereby would result, but that injury would be likely to follow as a cause of his negligent act.

3. Master and Servant—Employer and Employee—Evidence—Safe Instrumentalities—Safe Place to Work—Cross-Examination—Impeaching Evidence.

In an action for damages against the master for his negligence in not providing a safe method for the servant to do his work, wherein the evidence is conflicting as to whether the master should have furnished, in the exercise of due care, other and safer methods known, approved and in general use, and defendant's witness has testified on direct examination that the instrumentality furnished was the proper one, it is competent, on cross-examination and in contradiction, to bring out from him evidence to the effect that after the injury the master had adopted the method contended by the plaintiff to be the safer one.

CIVIL ACTION, before *Devin, J.*, at Third April Term, 1927, of WAKE.

This was a civil action for damages resulting from personal injury sustained by the plaintiff.

The evidence tended to show that the plaintiff was employed by the city of Raleigh as a laborer in digging ditches, and that on 27 May, 1926, he was instructed by the foreman to take a ten-pound sledge-hammer and assist the foreman in cutting a cast-iron pipe. The foreman held a cleaver or chisel in his hand placed upon the pipe, and the plaintiff was required to hit the cleaver with a sledge-hammer, thus cutting the pipe. The plaintiff struck the cleaver or chisel with the sledge-hammer and a shiver of iron or steel from the hammer or pipe struck him in the eye, resulting in blindness.

The pertinent allegation of negligence is as follows: "In that the defendant negligently, carelessly and wrongfully adopted an unsafe method and an unsafe means of cutting said iron pipe when there was a reasonably safe method of performing such services, in that the defendant was attempting to cut the six-inch cast-iron water main with chisel and sledge-hammer when the usual and ordinary method of cutting such pipes at said times, and for a long time prior thereto, was by the use of a saw or pipe-cutter, which said devices were in general and accepted use by others under similar conditions, and said devices were accessible and easily obtainable."

The theory of liability advanced by the plaintiff is that the sledgehammer was a very heavy instrument for the purpose for which it was used, and that a reasonably prudent person could foresee that shivers of steel or iron were likely to fly from the chisel or pipe from a blow with this heavy instrument. The defendant denied that it was negligent, and offered evidence tending to show that the method adopted by it in cutting the pipe was reasonably safe and in general use.

Upon the issues submitted to the jury the question of negligence was resolved against the defendant and damages in the sum of $2,500 awarded.

From the judgment upon the verdict the defendant appealed.

Douglass & Douglass, R. N. Simms, R. L. McMillan and R. Roy Carter for plaintiff.

Thomas W. Ruffin and C. W. Beckwith for defendant.

BROGDEN, J. The law of this State is that an employer of labor is required to exercise ordinary care in providing employees with reasonably safe methods and means to do the work for which they are employed. Thus, in *Noble v. Lumber Co.,* 151 N. C., 76, it is said: "It is elementary learning that it is the duty of the master to furnish his servant a reasonably safe method, as far as practicable, for doing his work." Again, in *Terrell v. Washington,* 158 N. C., 282, it is held: "The master fails to supply a safe place for work if he allows work to be conducted there in a manner needlessly dangerous to servants." To the same effect is the ruling in *Tate v. Mirror Co.,* 165 N. C., 273, as follows: "Whether it was practical for the defendant to use any other device than a metal pipe for the purpose of insuring safety to its employee, and whether ordinary prudence required the use of it, were questions for the jury, which were properly submitted to them. If the situation called for the use of a different device, and this would have appeared to the ordinarily careful man, under the same circumstances, it was the duty of the defendant to supply it, instead of needlessly subjecting his servant to danger." The opinion of the Court, quoting from *Smith v. Baker,* A. C., 325, proceeds: "An employer is bound to carry on his operations so as not to subject those employed by him to unnecessary risk, and he is not less responsible to his workmen for personal injury occasioned by a defective system of using machinery than for injury caused by defect in the machinery itself." *Thomas v. Lawrence,* 189 N. C., 521.

The trial judge submitted this phase of the case squarely to the jury in the following charge: "It was the duty of the defendant in the exercise of ordinary care to provide its servants and employees with reasonably safe places and safe tools and appliances to work with, and to provide them with reasonably safe methods and means to do the work for which they are employed and in which they are engaged."

In view of the method of cutting the pipe adopted by the defendant, could a reasonably prudent person in the exercise of due care have foreseen that injury was likely to occur? It is not essential that the particular injury could have been foreseen, but that some injury was likely to flow from the method used in performing the work. This principle of liability first announced in *Drum v. Miller,* 135 N. C., 204, flows through the decisions without a break, but with increasing volume. *Hall v. Rinehart,* 192 N. C., 706. This phase of the case was also properly presented to the jury by the trial judge. The case of *Rogers v. Mfg. Co.,* 157 N. C., 484, is similar in principle to the case at bar. In that case splinters and pieces of wood flew out of the machine injuring plaintiff. The Court said: "If the flying out of the chip was caused by the absence of the shield or hood, and the jury should further find that this would have been prevented by the use of the shield or hood, and the failure to provide such was want of reasonable care on the part of the defendant, it would be liable."

So, in the present case, if a lighter hammer or hack-saw, or goggles to protect the eyes of the workman, should have been provided in the exercise of that prevision which the law requires, or if a person of ordinary prudence could reasonably foresee or anticipate that injury would likely flow from the method employed, the defendant would be liable. The controverted questions and issues were submitted to the jury under a fair and comprehensive charge, and the judgment is upheld.

The defendant excepted to the testimony of one of its witnesses on cross-examination to the effect that goggles had been provided for employees after the injury. Nothing else appearing, this evidence was incompetent. *Shelton v. R. R.,* 193 N. C., 670. But the record discloses that the same witness on direct examination testified that: "The wearing of goggles is not customary and usual in the kind of work in which the plaintiff was engaged at the time of his injury. . . . The wearing of goggles by men working under the circumstances such as the plaintiff was working at the time of the injury would make the work more dangerous, . . . and it is not practicable to use goggles in work of this kind." It was, therefore, proper on cross-examination to contradict this witness by showing that, although he contended that the use of goggles was impracticable, still he had thereafter provided goggles for employees. The objection, therefore, to this evidence cannot be sustained. *Shelton v. R. R., supra.*

The record discloses that the cause was tried in accordance with the established principles of law, and the judgment is affirmed.

No error.

C. F. HARVEY v. C. OETTINGER ET AL.

(Filed 9 November, 1927.)

1. **Equity—Contribution—Bills and Notes—Endorsement.**

   Where one of several endorsers on a note has been legally required to pay, and does pay the same, he is entitled to contribution from the other endorsers under the principle that equality is equity, among those standing in the same situation.

2. **Bills and Notes—Negotiable Instruments—Corporations—Contribution—Endorsers—Equity—Receivers—Parties.**

   Where one of the endorsers of a note of a corporation taking over the business of another has been legally required to pay the note, and sues his coendorsers for contribution, and the answer alleges that the plaintiff had knowingly and fraudulently concealed the financial condition of the purchased corporation, and that he had failed under his agreement to properly attend to the financing of the purchasing corporation, and that the defendant's endorsement was thus procured by the plaintiff's fraud: *Held*, a sufficient defense is alleged to raise the issue for the jury, and overthrow the plaintiff's demurrer; and the position is untenable that the receiver of the corporation making the note and since declared insolvent can only maintain the action in his representative capacity.

CONNOR, J., dissenting.

APPEAL by defendants, H. E. Moseley, L. L. Oettinger, F. C. Dunn and Mrs. Myrtie A. Tull, executrix, from *Sinclair, J.*, at May Term, 1927, of LENOIR.

Civil action for contribution. Plaintiff and defendants, being stockholders in the Kinston Knitting Company, endorsed for accommodation, certain notes of said company, which were paid by plaintiff after default on the part of the principal and demand for payment refused by each of the defendants, coendorsers with plaintiff. Plaintiff sues for contribution.

The defendants, H. E. Moseley, L. L. Oettinger, F. C. Dunn and Mrs. Myrtie A. Tull, executrix of the estate of Henry Tull, deceased, demurred *ore tenus* to the complaint, but this was overruled. They then answered, setting out in detail the circumstances under which the transactions occurred, and alleging that the defendants were induced to endorse the notes in question under a misapprehension of the facts and because of the plaintiff's promise "to take charge of and manage all the affairs of the Kinston Knitting Company, and by express agreement to see that it was supplied with credit in order to carry on its operations," which said promise and agreement the plaintiff wrongfully, wilfully and negligently refused to carry out; and further, it is alleged, that at the time of the endorsement of said notes the plaintiff wrongfully and in violation of the duty which he owed to the defendants, withheld from them material and important facts bearing upon the condition of the Orion Knitting Mills, which the Kinston Knitting Company was organized to take over, and that the suppression of such facts amounted to a legal fraud upon the rights of the defendants. This alleged wrongful and fraudulent conduct of plaintiff is pleaded in bar of his right to recover in the present action.

The trial court, being of opinion that the matters set up by the answering defendants were not sufficient to defeat a recovery, rendered judgment in favor of the plaintiff on the pleadings. The answering defendants appeal, assigning errors.

Cowper, Whitaker & Allen and Connor & Hill for plaintiff.
Rouse & Rouse for defendants.

STACY, C. J., after stating the case: The demurrer, interposed by the appealing defendants was properly overruled. But from a careful perusal of the record, we are convinced that issuable matters have been set up by the answering defendants in their pleadings, and that appropriate issues should be submitted to a jury for a proper determination of the controversy. *Barnes v. Trust Co., ante,* 371.

If the answering defendants have evidence to support the allegation that they endorsed the notes in question under a misapprehension of the facts, caused by a wrongful suppression of information on the part of the plaintiff, this would carry the case to the jury. Contribution arises out of the principle that "equality is equity" among those standing in the same situation. *Moore v. Moore,* 11 N. C., 358. The defendants, by their allegations, deny that they stand in the same legal position with the plaintiff.

Again, equity will not aid the plaintiff, if the losses in question, as alleged by the defendants, were occasioned by his own wrongful act in wilfully refusing to carry out his promise to finance the corporation, and such promise was a material inducement to the defendants to endorse the notes of the Kinston Knitting Company. But this is only an allegation, and it is denied. The truth of the matter can be determined by a jury.

We do not regard the principle announced in *Douglass v. Dawson,* 190 N. C., 458, with respect to the right of the receiver of an insolvent corporation to maintain an action for a wrong done the corporation as distinguished from the right of a creditor to maintain an action for a wrong done to him personally, controlling on the facts of the present record. The action is for contribution, which could arise only upon payment by the plaintiff, and this seems to have been made after the appointment of the receiver. 6 R. C. L., 1036; 13 C. J., 821. But however this may be, the defendants plead personal losses directly induced by plaintiff's alleged wrongs, irrespective of the injuries alleged to have been sustained by the corporation. These allegations, if sustained, would seem to be sufficient at least to defeat plaintiff's action for contribution.

There was error in rendering judgment on the pleadings as against the answering defendants.

Error.

CONNOR, J., dissenting: No answer was filed to the verified complaint in this action by either of the defendants, C. Oettinger, T. V. Moseley or F. M. Taylor. The defendants, L. L. Oettinger, H. E. Moseley and F. C. Dunn filed a joint answer to the complaint in which they admit the material allegations upon which plaintiff prays judgment against all the defendants. In their answer they allege facts which they contend constitute a defense to plaintiff's action. The defendant, Mrs. Myrtie A. Tull, executrix of Henry Tull, deceased, formally adopted the answer of her codefendants as her answer to the complaint. Plaintiff filed a reply to the answer in which he denied the allegations of the answer upon which the answering defendants rely to defeat plaintiff's recovery. These answering defendants, other than Mrs. Myrtie A. Tull, executrix, filed a rebutter to the reply, in which they admitted the material facts set out in the reply, and reiterate the allegations of their answer.

Upon this state of the pleadings plaintiff moved for judgment by default final against defendants, C. Oettinger, T. V. Moseley and F. M. Taylor, for want of an answer, and against the answering defendants for that no facts are alleged in their pleadings, which constitute a defense to plaintiff's cause of action as set out in his complaint.

This motion was allowed, and judgment was rendered accordingly that plaintiff recover of all the defendants the sum of $96,168.53, this being seven-eighths of the total amount paid by plaintiff in discharge of the notes set out in the complaint, upon which plaintiff and defendants were jointly liable as sureties and which plaintiff had paid, upon demand of the holders of the notes, after their maturity, and after default by the maker, who had become insolvent. Provision is made in the judgment that the cause be retained, in order that if it shall hereafter appear that any of the defendants is insolvent, and for that reason plaintiff is unable to collect by execution the amount for which such defendant is liable by reason of the judgment, such other orders and judgments may be made and rendered herein as may be necessary and proper for the protection of the rights of plaintiff and of the defendants and each of them to the end that proper contribution may be had from all the defendants.

To this judgment the answering defendants excepted. They only have appealed from the judgment to this Court. Their codefendants, who filed no answer, make no complaint of the judgment. As to them the judgment is final.

In the court below the answering defendants demurred *ore tenus* to the complaint, for that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was overruled and said defendants excepted. Their first assignment of error is based upon this exception. I concur in the opinion of the Court that this assignment of error cannot be sustained.

Plaintiff and defendants were stockholders of the Kinston Knitting Mills, a corporation engaged in business in the city of Kinston, N. C. They had endorsed various notes, aggregating a large amount, executed by the corporation, for money borrowed to enable the corporation to carry on its business. They were each and all interested in the success of the corporation as stockholders. It is not denied that as such endorsers, by special agreement, they were liable as sureties on the notes, without priority, the one over the other. *Lancaster v. Stanfield,* 191 N. C., 340; *Dillard v. Mercantile Co.,* 190 N. C., 225; *Gillam v. Walker,* 189 N. C., 189.

These notes had been renewed from time to time. On 27 February, 1927, at a meeting of the board of directors of the said corporation, consisting of plaintiff, C. F. Harvey, and of defendants, C. Oettinger, L. L. Oettinger, F. M. Taylor, T. V. Moseley, H. E. Moseley, and C. F. Dunn, a resolution was adopted, reciting that the corporation "notwithstanding the best efforts and judgment of its officials and directors," was unable to meet its indebtedness, and directing that the officers of the corporation take steps at once to have a receiver appointed for the corporation. Thereafter a receiver was appointed, and the holders of the notes, which were endorsed by plaintiff and defendants, called upon the said endorsers to pay said notes. Defendants failed to pay said notes, or any part of same; plaintiff thereupon paid the notes, and has brought this action against defendants, his cosureties, for contribution.

The appellants resist recovery by plaintiff upon their allegation that the corporation was rendered insolvent, and thereby unable to pay its indebtedness, including said notes, by the wrongful conduct of plaintiff, its president (1) in that plaintiff, in breach of his duties as president, absented himself from his office, for four months, during which time he was traveling in Europe, and (2) in that plaintiff, in breach of his duties as president, failed to procure further extensions of the notes upon which he and defendants were liable as sureties. Defendants allege that they endorsed said notes, and thereby became liable as sureties, upon their assurance that plaintiff would faithfully perform his duties as president, and would use his personal credit to procure extension of said notes. All of the defendants, except Mrs. Myrtie A. Tull, executrix, were directors of the corporation; defendant F. C. Dunn was first vice-president, and defendant H. E. Moseley second vice-president of the corporation.

I am of the opinion that if all the facts alleged in the answer and rebutter of the answering defendants be established, such facts do not constitute a cause of action upon which these defendants could recover of plaintiff, and that they therefore do not constitute any defense to this action in behalf of these appellants. The cause of action, if any, arising upon the facts alleged in the answer and rebutter can be maintained only by the corporation or by the receiver. The damages, if any, resulting from the breach of his duties by plaintiff, as president of the corporation, are assets of the corporation, and should be administered for the benefit of the corporation, its creditors and all its stockholders. I think the law as stated in *Douglass v. Dawson,* 190 N. C., 458, is applicable to these facts. This case does not, in my opinion, fall within the principle of *Bane v. Powell,* 192 N. C., 387. The distinction between these two cases has been clearly stated in the recent opinion of this Court in *Wall v. Howard, ante,* 310. These cases deal with actions against directors of insolvent banks, but the principles of law upon which they were decided are applicable to actions involving the conduct of officers and directors of corporations other than banks.

The result of this decision, it seems to me, is that three out of seven directors of the Kinston Knitting Mills are permitted to set up as a defense to a cause of action, upon which they are personally liable, facts which constitute a cause of action, upon which the corporation or its receiver alone is entitled to recover. Defendants who filed no answer and against whom a final judgment has been rendered in this action, upon the facts alleged are as much entitled to maintain this defense as the answering defendants. Neither of them is so entitled, in my opinion; only the corporation which has sustained damages by reason of the wrongful acts of plaintiff, its president, or its receiver, may maintain an action upon the facts relied upon by these defendants. I do not think that their pleadings can be justly construed as alleging any contract or agreement by the plaintiff with these defendants, as individuals. Plaintiff as president owed certain duties to the corporation; for damages resulting from a breach of these duties, if any, he is manifestly liable only to the corporation. The general allegations that plaintiff agreed to finance the corporation, by means of his personal credit—without regard to any limit as to amount or as to time, or as to conditions that might arise in the future, and that he failed to comply with this agreement, are not sufficient, in my opinion, to give rise to a cause of action in behalf of the defendants against him, or to constitute a defense to his action against them for contribution. He cannot be held liable to them, either in law or in equity upon these allegations.

Defendants, who are officers and directors of the corporation, owed a duty to the corporation, its stockholders and creditors, with respect to the matters upon which they rely for defense in this action which is brought against them as individuals. They allege that for four months the plaintiff, as president, failed to perform his official duties, and that the corporation thereby suffered damages. It does not seem that they ought to be permitted, in law or in equity, to set up as a defense in this action the breach by the plaintiff of his duties as president when necessarily it appears that they knew of such breach and took no steps to prevent it.

I cannot concur in the decision made by the Court of the question presented by this appeal. In my opinion there is no error in the judgment of the Superior Court, and it should be affirmed.

H. S. DOWLING v. SOUTHERN RAILWAY COMPANY.

(Filed 9 November, 1927.)

1. **Actions—Statutes—Facts Agreed.**

   Where the facts are agreed upon by the parties and the trial court is thereupon by agreement to rule the law, in a suit to quiet title to lands, it differs from a controversy submitted without action under the provisions of C. S., 626.

2. **Railroads—Eminent Domain—Easements—Rights of Way—Damages—Compensation of Owners of Land—Courts.**

   Where a railroad company organized under the law of another State is authorized under its charter to acquire lands for railroad purposes, which may be "necessary" or wanted for building a railroad, and by statute in this State it is given the same right of condemnation as it had under its charter, with "all the general powers that are by statute concerning corporate companies conferred on corporations," and the railroad company has in pursuance of this restrictive right entered upon the plaintiff's land and continuously occupied a right of way of a certain width; and no agreement having been made with the owners as to the amount of compensation, such owners bring action to have the amount ascertained, and have been paid accordingly: *Held*, the compensation paid to the owners was only for the width of the restricted right of way originally taken, and the general statute presuming that the right of way taken thereunder would extend "not less than eighty nor more than one hundred" feet, has no application either in favor of the original railroad or its successors in title as affecting the width of the right of way originally taken under its charter.

3. **Same—Suits—Cloud on Title—Equity—Anticipatory Damages—Courts.**

In this suit to remove a cloud upon the title to plaintiff's land: *Held*, under the exceptions presented by plaintiff's appeal, a new trial will not be granted, as they are based on an anticipatory occurrence, which has not happened.

4. **Courts—Supreme Court—Decisions.**

An opinion of the Supreme Court should be considered and applied as a precedence in its relation to the facts upon which its conclusions of law are based.

APPEALS by plaintiff and defendant from *Finley, J.*, at March Term, 1927, of MECKLENBURG.

Civil action to quiet title and to remove cloud therefrom.

By stipulation of counsel, duly entered of record, the fact situation was agreed upon, a jury trial waived, and the cause submitted to the judge for determination, as a matter of law, on undisputed facts. These, so far as essential to a proper understanding of the legal questions involved, may be abridged and stated as follows:

1. The plaintiff is the owner of a lot of land situate in the city of Charlotte, which is a part of a two-acre tract, originally owned by the heirs of Edward Lonergan, "through and upon a portion" of which the Atlantic, Tennessee and Ohio Railroad Company, a Tennessee corporation, constructed its line of railroad, consisting of "roadbed, track and necessary appurtenances," soon after it was authorized to do business in this State by act of Assembly, 15 February, 1855, ch. 27, Laws of 1854-1855, with the same power it had under its Tennessee charter, previously granted in 1852, of "surveying, locating and condemning property that is allowed in the State of Tennessee."

2. Under its Tennessee charter the A. T. & O. R. R. Company was authorized and empowered to "purchase, have and hold in fee, or for a term of years, any lands, tenements or hereditaments which may be necessary" for building a railroad, with one or more tracks, to be used with steam, animal or other power, between Charlotte, N. C., and some point on the East Tennessee and Virginia Railroad; and further the president and directors of said company, or their agents, were authorized to agree with the owner of any land, earth, timber or stone or any

other materials or improvements "which may be wanted for the construction or repair of any of said road or any of their works," and in case they failed so to agree, condemnation was authorized "where such land or material may be wanted" for the purposes aforesaid, and upon the payment of the damages assessed in such proceeding, the said company was permitted to enter upon the premises and appropriate to the use of the company any land, earth, timber, stone, or other materials "necessary for the construction of said railroad."

3. By an act of the General Assembly of North Carolina, ratified 23 February, 1861, the charter of the A. T. & O. R. R. Company was amended whereby said company was given "all the general powers that are by the statute concerning corporate companies conferred on corporations."

4. Under the statute then in force concerning corporate companies, chapter 61, Revised Code (1854), sec. 27, now C. S., 1733, it was provided that the "width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments when it may be of greater width."

5. At the October Term, 1862, Court of Pleas and Quarter Sessions, Mecklenburg County, North Carolina, the heirs of Edward Lonergan, plaintiff's predecessors in title, filed their petition in said court alleging that the A. T. & O. R. R. Company had located its railroad through and upon a portion of their lands, situate in the city of Charlotte; "that they cannot agree with your petitioners in the price to be paid them for the land so occupied," and they asked that commissioners be appointed to assess the damages, which were assessed at $500, and this amount was paid by the said railroad company.

6. The A. T. & O. R. R. Company constructed its line of railroad over the *locus in quo,* about the year 1859 or 1860, and the physical structure of the railroad, including roadbed, track and appurtenances, is the same today as it was when originally built.

7. The defendant, Southern Railway Company, is the successor in title to all the right, title and interest formerly owned by the A. T. & O. R. R. Company, in and to said line of railroad and its appurtenances, and is now engaged in operating the same.

Upon these facts, the facts chiefly pertinent, the trial court held that the Atlantic, Tennessee and Ohio Railroad Company acquired by reason of the location of the road in question, and by virtue of the condemnation proceeding, instituted by plaintiff's predecessors in title, a right of way over that part of the *locus in quo* actually occupied by its roadbed, track and physical structure, and no more. Whatever right the A. T. & O. R. R. Company thus acquired, it is conceded, the defendant now owns.

From said judgment both plaintiff and defendant appeal, assigning errors.

Taliaferro & Clarkson for plaintiff.
John M. Robinson for defendant.

STACY, C. J., after stating the case: This is not a controversy without action, submitted on an agreed statement of facts, for the determination of a question in difference between the parties, as authorized by C. S., 626, but it is an action to quiet title and to remove cloud therefrom. Certain facts having been agreed upon by the parties, a jury trial was waived and the matter submitted to the court, on the facts agreed, for determination and adjudication of the rights of the parties.

With respect to the plaintiff's appeal, it is sufficient to say that the assignments of error, appearing of record, are not well founded. The chief objection is apparently based on an anticipatory occurrence, which has not happened, and we think the judgment accords to the plaintiff all that is warranted by the instant facts. Plaintiff has no just cause to complain.

The defendant's appeal presents the question as to whether the Atlantic, Tennessee and Ohio Railroad Company, by reason of the location of its railroad, through and upon a portion of the *locus in quo* in 1859 or 1860, and by virtue of the condemnation proceeding, instituted by plaintiff's predecessors in title in 1862, acquired a right of way of "not less than eighty feet nor more than one hundred," or only of the width of so much as was actually occupied by its roadbed, track and physical structures.

It is the contention of the defendant that the condemnation proceeding, instituted by plaintiff's predecessors in title, was brought under the general statute, and that the width of the right of way, condemned thereunder, was necessarily not less than 40 feet nor more than 50 feet on either side, measuring from the center of the track. For this position defendant relies strongly upon what was said in the following cases: *Wearn v. R. R.,* 191 N. C., 575; *Griffith v. R. R.,* 191 N. C., 84; *Tighe v. R. R.,* 176 N. C., 239; *Hendrix v. R. R.,* 162 N. C., 9, and *R. R. v. Olive,* 142 N. C., 264.

It must be conceded that the language used in some of our decisions, unless heed be given to its setting, is broad enough to afford some show of force and color of strength to the defendant's position. For this reason the admonition given by *Chief Justice Marshall* in *Burr v. U. S.,* 4 Cranch, 470, seems appropos: "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered."

The one circumstance which differentiates this case from all the rest is the fact that at the time the road in question was constructed through and upon a part of the *locus in quo,* the A. T. & O. R. R. Company was authorized to take only such right of way as was "wanted" or "necessary" for the construction of its line of railroad. This it took in 1859 or 1860. The condemnation proceedings, instituted in 1862 by the Lonergan heirs, plaintiff's predecessors in title, was for the land thus previously taken and "so occupied." Damages for this, and this alone, seems to have been awarded in said proceeding. At any rate, such was the holding of the court below, and no error has been made to appear on defendant's appeal.

The law in respect to the right of way acquired by the Atlantic, Tennessee and Ohio Railroad Company was before us in the case of *Griffith v. R. R.,* 191 N. C., 84, and we deem it unnecessary to repeat what has been so recently said in a valuable opinion in that case by *Associate Justice Brogden.*

The judgment must be upheld on both appeals.

Affirmed.

T. H. EDWARDS AND J. F. EDWARDS v. J. P. NUNN ET AL.

(Filed 9 November, 1927.)

1. **Contracts—Parol Evidence—Evidence—Bills and Notes—Renewals—Mortgages—Liens.**

   Parol evidence is competent to show that the original note, secured by a mortgage on lands, was several times renewed, and that the note in suit was the last of the series, it being of matters not embraced in the written part of the transaction, and when so established the time of the making of the original mortgage note will give the mortgagee priority of lien over a later docketed judgment.

2. **Appeal and Error—Instructions—Objections and Exceptions.**

   An instruction will not be considered on appeal unless there has been an exception thereto duly entered.

APPEAL by defendants C. Heber Moore and Mrs. W. A. Kornegay from *Bowie, Special Judge,* at June Term, 1927, of LENOIR.

One issue was submitted and answered as follows:

1. What sum, if any, have the plaintiffs paid out for the benefit of the defendants, J. P. Nunn and wife, Mittie Nunn, and to the damage of the plaintiffs, as endorsers on notes of the said defendants, Nunn, under the terms of the indemnifying mortgage set out in plaintiffs' complaint? Answer: Yes, $4,627.30, with interest.

Judgment for plaintiffs. Exception and appeal for errors assigned.

Cowper, Whitaker & Allen for plaintiffs.
Sutton & Greene and Shaw & Jones for appellants.

ADAMS, J. This was a special proceeding instituted before the clerk of the Superior Court to determine how a fund paid into his office should be applied. C. S., 2592, 2593.

On 26 December, 1919, J. P. Nunn and his wife, to secure an indebtedness of $7,800, executed to the First National Bank of Kinston a mortgage on certain real property known as the Bagby land; on 12 October, 1920, they executed a mortgage on this land and on a house and lot in Kinston to secure an indebtedness to J. N. Jones in the sum of $6,000; and on 21 December, 1922, they executed to the plaintiffs a mortgage on the Bagby land to indemnify the mortgagees against loss by reason of their indorsement of a note of $4,000 made by J. P. Nunn to the First National Bank of Kinston and of other notes not to exceed the total sum of $5,000. These mortgages were duly registered. On 14 February, 1922, W. C. Fields and Harvey & Sons Company each recovered and docketed a judgment against the defendant Nunn—Fields in the sum of $906.16, and Harvey & Sons Company in the sum of $991.05. C. Heber Moore, also, recovered a judgment against Nunn for $6,000 at the June Term, 1922, of the Superior Court, on which there is a credit of $4,570.12. To this judgment the defendant Mrs. Kornegay asserts title by assignment.

On 31 January, 1927, the First National Bank of Kinston foreclosed its mortgage on the Bagby land and Simpson Harper became the purchaser at the price of $15,000. On the same day J. N. Jones foreclosed his mortgage on the house and lot and W. S. Nunn and his wife became the purchasers at the price of $4,000. From this sum expenses amounting to $23.40 were deducted and $3,976.60 was credited on the mortgage, leaving $2,437 as the remainder due on the Jones mortgage. This remainder was paid out of the fund held by the First National Bank of Kinston and there was left a surplus of $4,480.31, which is the subject of the present controversy.

This is a part of the proceeds arising from the sale of the Bagby land described in the mortgage held by the plaintiffs to indemnify them against loss for their indorsement of Nunn's notes. They contend that they had indorsed his notes and had paid on their indorsement for Nunn's benefit $700 on 1 February, 1927, and $3,927.30 on 23 February, 1927, and the jury accepted their statement, returning a verdict in favor of the plaintiffs for $4,627.30.

The appellants assign as error the admission of parol evidence to show the renewal from time to time of the four thousand dollar note indorsed by the plaintiffs and to show that the first seven hundred dollar note was indorsed by them prior to the time the appellant's judgment was docketed. The appellants contend that these are matters which must be established by record evidence. It is elementary that as a rule an inferior grade of evidence should not be admitted if a higher grade can be produced and that written instruments furnish the best evidence of their contents. It is likewise elementary that testimony is not excluded by this rule unless there is an attempted substitution of an inferior for a better grade or quality of evidence. "It often happens that parol testimony as to a fact may be primary evidence of the same fact. If the essential fact to be proved is not the contents of a written instrument, but an independent fact to which the writing is merely collateral or of which it is merely an incident there is no reason for the application of the rule." Jones on Evidence (2 ed.), 249, sec. 203. *Ledford v. Emerson,* 138 N. C., 502. Applying this principle we find no error in the admission of the evidence.

The appellants excepted also to the denial of their motion to dismiss the action as in case of nonsuit and to the entry of judgment as it appears in the record. We have examined the record with care and are of opinion that these exceptions should be overruled. There was no exception to the instructions given the jury. We find

No error.

C. M. EVERHART v. ATLANTIC FIRE INSURANCE COMPANY ET AL.

(Filed 9 November, 1927.)

Insurance, Fire—Policies—Mortgages—Loss Payable Clause—Settlement of Loss by Mortgagor—Actions.

Where a fire insurance policy is issued on the dwelling of a mortgagor with a loss payable clause to the mortgagee as their interests may appear: *Held,* in the event the dwelling is destroyed by fire, the interest of the mortgagee as to the amount of his recovery is the same as that of the mortgagor, and after the latter has accepted a given amount in full settlement after the fire and executed his release, the former may not claim against the insurer an amount greater than that agreed upon and accepted by the mortgagor in the absence of fraud, but this does not apply when the form of the mortgage clause is that of the "New York Standard Mortgage Clause."

APPEAL by defendant, Atlantic Fire Insurance Company, from *Lyon, Special Judge,* at April Special Term, 1927, of DAVIDSON.

Civil action by plaintiff appointee under ordinary loss payable clause in a policy of fire insurance, as interest may appear, to recover on contract of insurance issued by the Atlantic Fire Insurance Company to Sam Ayers.

The facts are these: On 14 December, 1925, the defendant company issued to Sam Ayers a fire insurance policy for a term of three years in the amount of $600.00, containing a three-fourths value clause, as a protection against loss or damage by fire to his dwelling or house situate in the town of Lexington, N. C. The plaintiff held a purchase-money mortgage on said house and lot for $1,600.00 at the time said policy was issued, in consequence of which the following loss payable clause was inserted therein:

"Any loss that may be ascertained and proven to be due the assured under the building items of this policy shall be held payable to C. C. Everhart, mortgagee, as interest may appear, subject, nevertheless, to all the terms and conditions of this policy."

On 31 January, 1926, while said policy was in full force and effect, the dwelling covered thereby was totally destroyed by fire.

Thereafter, on 19 February, 1926, the assured, Sam Ayers, and the defendant agreed upon a settlement and fixed the value of the house at $600.00 and the defendant's liability under the policy at $450.00. The defendant issued its voucher for this amount made payable to the plaintiff and Sam Ayers. The latter offers, in his answer to endorse the whole amount of said voucher over to the plaintiff, and alleges that the settlement is a fair and reasonable one. Plaintiff declines to accept the settlement, and contends that the value of the house at the time of the fire was not less than $1,200 and that the defendant is liable to plaintiff for the full amount of its policy, to wit, $600.00.

From a verdict and judgment in favor of plaintiff for $600.00, with interest from 1 April, 1926, the defendant appeals, assigning errors.

P. V. Critcher for plaintiff.
Walser & Walser for defendant.

STACY, C. J., after stating the case: Plaintiff was appointed under the policy in suit to receive payment, as his interest might appear, instead of the assured, in case the latter sustained any loss or damage to his dwelling by fire during the time the said policy of insurance was in force. This, it has been held in a number of cases (*Roper v. Ins. Co.,* 161 N. C., p. 161), is the extent of the mortgagee's interest in the contract when it arises, as it does here, under an ordinary loss payable clause, and not under a "New York standard mortgage cluase." We had occasion to consider the effect of the latter in *Bank v. Ins. Co.,* 187 N. C., 97, where it was said: "With respect to the rights of the mortgagee under the standard mortgage clause, it is the generally accepted position that this clause operates as a separate and distinct insurance of the mortgagee's interest, to the extent, at least, of not being invalidated by any act or omission on the part of the owner or mortgagor, unknown to the mortgagee; and, according to the clear weight of authority, this affords protection against previous acts as well as subsequent acts of the assured," citing authorities for the position.

But it is the holding with us, as well as with a majority of the courts throughout the country, that under an open "Loss Payable Clause" (a clause providing that the loss, if any, shall be payable to the mortgagee, as his interest may appear), in the absence of any other stipulation in regard to the interest of the mortgagee, the rights of the mortgagee are dependent entirely upon those of the mortgagor, and that any act or omission on the part of the latter, sufficient to avoid the policy as to the mortgagor, will avoid it as to the mortgagee also. Note: 18 L. R. A. (N. S.), 199. If this be true as to acts done before any loss occurs, we see no reason why a release executed by the assured, after the loss has been sustained, would not ordinarily be binding on the mortgagee. The property was his; the loss is his. *Gilman v. Commonwealth Ins. Co.,* 112 Me., 528, 92 Atl., 721, 55 L. R. A. (N. S.), 758, and note.

In the instant case, the assured has agreed to settle his loss with the defendant company for $450.00. There is no allegation of any collusion or fraud. We think the settlement is binding on the plaintiff.

The motion for judgment as of nonsuit should have been allowed.

Reversed.

E. L. TUCKER v. NORFOLK AND WESTERN RAILROAD COMPANY.

(Filed 9 November, 1927.)

Carriers of Goods—Common Carriers—Railroads—Negligence—Damages —Loading Cars—Connecting Lines of Carriage—Evidence.

The defective loading of a carload shipment by the initial carrier by rail does not render the delivering carrier, in a connecting line of transportation liable in damages to the consignee, who was injured thereby in unloading the same, when there is nothing in the external appearance of the car to put the delivering carrier upon notice of the defects, which were discoverable only upon the door of the car being opened.

APPEAL by plaintiff from *Stack, J.*, at July Term, 1927, of ASHE. Affirmed.

R. A. Doughton, C. W. Higgins and T. C. Bowie for plaintiff.

Ira T. Johnston, W. B. Austin, F. M. Rizinus, Burton Craige and Murray Allen for defendant.

ADAMS, J. In January, 1926, the Tuckerdale Feed and Grain Company ordered a carload of fencing wire and nails which was shipped to it from Pittsburgh, Pennsylvania. From Fairfield, Alabama, to Bristol, Virginia, the car was carried by the Birmingham-Southern Railroad, and by the defendant from Bristol to Tuckerdale, in North Carolina. At Tuckerdale it was placed on a sidetrack and the consignee was notified of its arrival. The consignee is a partnership; the plaintiff is one of the firm. When the plaintiff and two others "fetched a surge" and opened the door for the purpose of unloading the car, a roll of wire weighing 152 pounds fell through the opening, struck the plaintiff on the back, and injured him. He brought suit to recover damages, alleging that the injury had been caused by the defendant's negligence. The specific charges of negligence were (1) that the iron track supporting the door "was in a defective condition so that said door could not be opened and shut with reasonable safety," and (2) that the car was negligently loaded "in that said wire and nails were so placed and loaded in said car as to render it unsafe for the consignees or their agents or employees, when unloading said car with reasonable prudence and care."

It was the duty of the initial carrier to exercise due care to provide a car reasonably safe and suitable for the shipment. 22 R. C. L., 932, sec. 177. *Forrester v. R. R.*, 147 N. C., 553; *Bivens v. R. R.*, 176 N. C., 414. Also, it is true that where a connecting carrier accepts the shipment it adopts the car provided by the initial carrier and in certain circumstances may be responsible for damages caused by its unfitness for the carriage of the goods. *Lucas v. R. R.*, 165 N. C., 264. "But it is no part of the duty of an intermediate carrier to examine a car to see whether it is in a safe condition for any one to enter for the purpose of unloading it when it reaches its destination." 22 R. C. L., 933, sec. 178. In the case just cited it was shown that potatoes had been shipped in an unventilated car which had previously been loaded with fertilizer. But in the present case we find no sufficient evidence that the car was not suitable for the shipment of wire and nails. The fact that special effort was necessary to open the door is not sufficient. If the door was defective the mere defect would not have injured the goods or impaired their value. Moreover, the defect could have been discovered only by opening the door. The plaintiff testified: "I didn't detect anything the matter with the car when I went to open the seal. I noticed the rollers on top, and noticed that the door was hard to roll. I didn't notice anything particular about the door until I went to open it." And Roby Blevins who assisted him said: "I could not say whether the door was in good working condition or not, it was difficult for us to open it. Of course, I could tell my ideas; it is my opinion that the door was crowded with the wire; that the wire was pressing against the door, as it bulged out when the door was opened, or partly open."

If it be granted that the car was negligently loaded, the negligence was that of the initial carrier, knowledge of which could have been acquired by the defendant only by breaking the seal and opening the car. The record fails to disclose any emergency which required such action. See *Moore v. R. R.*, 183 N. C., 213; *Oregon R. R., etc. v. McGinn,* 258 U. S., 409, 66 L. Ed., 689. Judgment

Affirmed.

STATE v. O. Y. YARBORO.

(Filed 9 November, 1927.)

1. **Criminal Law—Appeal and Error—State's Appeal—Statutes.**

Where there is a verdict convicting a defendant of a misdemeanor under the provisions of a statute prohibiting the drawing of a worthless check on a bank under certain conditions, and a judgment has been rendered in favor of the defendant *non obstanti veridicto*, the State may appeal under the provisions of our statute. C. S., 4649.

2. **Constitutional Law—Statutes—Police Powers—Public Evil—Intent.**

As a part of the exercise of its police power, inherent in a State, the Legislature, when not prohibited by the State or Federal Constitution, may validly enact a statute to suppress a far reaching existing potential evil, making the commission of the prohibited act a misdemeanor, and punishable as a crime against the State, without reference to whether it was done with a fraudulent intent.

3. **Same—Worthless Checks.**

Our statute generally known as the Worthless Check Law, making it a misdemeanor for one to draw a check on a bank knowing that he had no funds on deposit therein sufficient to meet it or having made arrangement with the bank for its payment on presentment, is a valid exercise by the State of its police powers, the offense being the commission of the act prohibited by the statute, and not an imprisonment for debt prohibited by our State Constitution. Article I, sec. 16.

4. Statutes—Fraud—Worthless Checks.

The issuance of a check on a bank in violation of our "Worthless Check Law," is a false representation of subsisting facts that the maker has on deposit sufficient funds for its payment at the bank, upon its presentation, or that he has made the necessary arrangements with the bank therefor, and is in effect a fraud upon the payee, the payee accepting it in good faith.

STACY, C. J., and CONNOR, J., concurring; CLARKSON and BROGDEN, JJ., dissenting.

APPEAL by State from *Grady, J.*, at June Term, 1927, of HALIFAX.

The defendant was indicted and convicted of a breach of the following statute, which was ratified 2 March, 1927:

"An act to prevent the giving of worthless checks.

"Whereas, the common practice of giving checks, drafts, and bills of exchange, without first providing funds in or credits with the depository on which the same are drawn, to pay and satisfy the same, tends to create the circulation of worthless paper, overdrafts, bad banking, and check kiting, and a mischief to trade and commerce; and it being the purpose of this act to remedy this evil,

"The General Assembly of North Carolina do enact:

"SECTION 1. It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

"SEC. 2. That any person, firm or corporation violating any provision of this act shall be guilty of a misdemeanor.

"SEC. 3. That the word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft.

"SEC. 4. That chapter fourteen of the Public Laws of nineteen hundred and twenty-five be and the same is hereby repealed.

"SEC. 5. That this act shall be in full force and effect from and after its ratification.

"Ratified this the 2nd day of March, A.D. 1927." Public Laws 1927, ch. 62.

After verdict the defendant moved in arrest of judgment. The motion was allowed and the State appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Ben T. Holden and White & Malone for defendant.

ADAMS, J. On 22 March, 1927, the defendant drew a check on the Farmers and Merchants Bank of Louisburg, payable to the order of George C. Green in the sum of $100, which was to be credited on a fee charged the defendant for services rendered in part and in part to be rendered by the payee in the capacity of an attorney at law. When he delivered the check he assured the payee that it would be paid when presented at the bank. On the same day, for a similar consideration, he gave a check to W. H. Yarborough. He had no money on deposit and no understanding or arrangement with the bank for the payment of these checks, and for this reason when presented they were returned unpaid. Thereafter the defendant was indicted for a breach of the statute set out in the statement of facts. At the trial he declined to introduce evidence, and after the State had rested its case he moved to dismiss the action. This motion was denied, and he was convicted. Upon return of the verdict he moved in arrest of judgment on the ground that the indictment charged no criminal offense, and the court being of opinion that the statute denounces as a crime the mere nonpayment of a debt without any finding of fraud or false pretense and conflicts with Article I, sec. 16, of the Constitution, granted the defendant's motion and arrested the judgment. The State excepted and appealed. C. S., 4649.

Under the general rule that judgment may be arrested only for errors which appear on the face of the record, it may be granted that an indictment charging the breach of a statute enacted in disregard of a positive constitutional inhibition manifests such error as will justify refusal to pronounce judgment in case of conviction. The principle is that everything charged in the indictment may be true and yet no criminal offense may have been committed. *S. v. Watkins,* 101 N. C., 702; *S. v. Marsh,* 132 N. C., 1000. An unconstitutional law is void and an act which it condemns is not a crime because the organic law is essentially the supreme law. *Ex parte Siebold.* 100 U. S., 376, 25 Law Ed., 717; *Huntington v. Worthen,* 120 U. S., 10, 30 Law Ed., 588. But the statute in question is presumed to be valid. Every act of the Legislature is presumed to be in harmony with the Constitution and all doubts are to be resolved in favor of its validity. This Court has said that an act will be declared unconstitutional only when no reasonable doubt exists. *S. v. Moss,* 47 N. C., 66; *S. v. Moore,* 104 N. C., 714; *Coble v. Comrs.,* 184 N. C., 342.

"There shall be no imprisonment for debt in this State, except in cases of fraud." Const., Art. I, sec. 16. If the statute is in conflict with this prohibition it cannot be upheld, for the manifest object of the section, first appearing in the Constitution of 1868, was the abolition of imprisonment for debt which had previously had legal sanction. The former law granted an execution against the body of the defendant in civil actions in which money only was recovered. It was not essential that fraud should be proved. The execution was a writ known as *capias ad satisfaciendum,* the office of which was to imprison the debtor until he had paid the debt, costs and damages. If he had property when he was taken into custody he could surrender it; if he had none he could take the oath of an insolvent. Laws 1773, ch. 4; Const. 1776, sec. 39; Revised Code, ch. 59; *Burton v. Dickens,* 7 N. C., 103; *Jordan v. James,* 10 N. C., 110; *Crain v. Long,* 14 N. C., 371; *McNair v. Ragland,* 17 N. C., 42; *Griffin v. Simmons,* 50 N. C., 145. The constitutional provision of 1868 was intended to annul the old law and to interdict imprisonment for debt except in cases of fraud. It has been said that the framers of the Constitution, in forbidding imprisonment for debt, referred to the cause of action as being *ex contractu,* and thereby implied that imprisonment is not forbidden in every civil action, but may be allowed in actions which are not for debt. *Moore v. Green,* 73 N. C., 394; *Long v. McLean,* 88 N. C., 3. The section was aimed primarily at the law which gave the right of execution against the body of the defendant in civil actions; and if it be granted that it extends to and forbids criminal prosecutions for simple breach of contract, still we are convinced that error was committed in arresting the judgment.

At common law a fraudulent act was prosecuted as a crime only when it was calculated to defraud a number of people, and for this reason statutes were enacted in England to punish a variety of frauds not previously punishable. Some of these statutes, reënacted here, have been united with the body of our criminal law. Section 4277 of Consolidated Statutes, which denounces as a felony the intentional obtaining of property by false tokens or other false pretenses, was derived from 33 Henry VIII, ch. 1, and 30 George II, ch. 24. *S. v. Phifer,* 65 N. C., 321. Under this statute and others similar to it the person defrauded must have parted with something of value, as exemplified by a sequence of opinions from *S. v. Simpson,* 10 N. C., 621, to *S. v. Roberts,* 189 N. C., 93. To this group may be referred the frauds within contemplation of the constitutional provision heretofore set out—a conclusion which, we venture to say, may reasonably be deduced from several of our own decisions. The phrase "in cases of fraud" qualifies the word "debt"; it signifies fraud in making the contract or in attempting to evade performance by the fraudulent concealment or disposition of property or other fraud devised for the purpose of defeating collection of the debt. In *Melvin v. Melvin,* 72 N. C., 384, "fraud," as used in section 16, *supra,* was defined by *Chief Justice Pearson* as "fraud in attempting to hinder, delay and defeat the collection of a debt by concealing property and other fraudulent devices, fraud in making the contract—false representations for instance, and fraud in incurring the liability, for instance, when an administrator commits a fraud by applying the funds of the estate to his own use, paying his own debts and the like." And in *Moore v. Mullen,* 77 N. C., 327: "It is clear that the words 'except in case of fraud' are evidently used in a very restricted sense, such as fraud in procuring a contract to be made, or fraud in attempting to evade performance—as by concealing property, or by attempting to run it out of the State, or by making a fraudulent disposition of it." See *Powers v. Davenport,* 101 N. C., 286.

It may be conceded that the defendant perpetrated no fraud at the time he engaged the services of his attorneys, and that under the cases last cited he was not culpable in contracting the debt; but this does not imply that a fraudulent act cannot be made punishable as a crime unless it induces or results in simultaneous loss, or that imprisonment for breach of the statute in question is imprisonment for debt, or that the defendant in this action practiced no fraud in giving the check. It is necessary to keep in mind the distinction between cases in which present loss is caused by fraud in contracting the debt, punishable under the provisions of the English statutes which have been reënacted here, and those in which there is subsequent fraud, disconnected with the inception of the debt and punishable under the general police power of the State. Failure to observe this distinction would conveniently destroy the foundation on which the argument in behalf of the State is based. It would assume that the statute penalizes imprisonment for debt; but this assumption, as we understand the law, would be altogether premature. It would be a fair illustration of a syllogism in which the major premise assumes the fact to be proved. This is the very point upon which there is divergence of opinion—the point, in truth, which *Chief Justice Pearson* thoughtfully clarified. It is difficult to detect in the defendant's execution and delivery of the check any fraud in procuring the contract, making the debt, or evading performance by concealing or disposing of property—elements constituting fraud for which there may be imprisonment for debt. But the recent statute condemns an act which may have nothing to do with incurring the debt or defeating its collection "by concealing property or other fraudulent devices"—an act wilfully done, it may be long after the debt has been contracted, and therefore not within the purview or contemplation of the constitutional inhibition. It follows, in our opinion, that the statute does not conflict with Article I, sec. 16, of the Constitution.

A crime is an act or omission punishable as an offense against the State. 1 McClain on Crim. Law, sec. 4. Crimes *mala in se* comprise acts which are wrong in themselves, as murder or arson, but acts which are *mala prohibita* are crimes only because they are prohibited by the common law, by statute, or by ordinance. The Legislature, unless restrained by the organic law, has the inherent power to prohibit and punish any act as a crime. 16 C. J., 60. In *Halter v. Nebraska,* 205 U. S., 34, 51 Law Ed., 696, 701, the Court in treating the subject expressed this conclusion: "Another vital principle is that, except as restrained by its own fundamental law, or by the supreme law of the land, a State possesses all legislative power consistent with a republican form of government; therefore each State, when not thus restrained, and so far as this Court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people."

We recognize the principle that the police power may not be exercised in breach of rights which are guaranteed by the Constitution of the State or Nation; but if, as we have said, the assailed statute is not in conflict with the fundamental law its enactment was a lawful exercise of legislative power. The police power is a necessary attribute of every civilized government; it is not a grant derived from or under any written constitution, but it is inherent in the several States. It is but "another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the State," and by means of it "the Legislature exercises a supervision over matters involving the common weal and enforces the observance by each individual member of society of the duties which he owes to others and to the community at large." 6 R. C. L., 183, sec. 182; 185, sec. 184. So we have held that by virtue of the police power the law-making body may enact laws for the enjoyment of private and social life, the beneficial use of property, the security of the social order, and the prevention and punishment of injuries, as well as for the protection of the life, safety, health, morals, and comfort of the citizen. *S. v. Vanhook,* 182 N. C., 831. This attribute of sovereignty imports authority, not only to punish an injury which has become a public nuisance, but to punish fraudulent acts which tend to deceive, to destroy confidence, and to injure the public interests. Does the giving of worthless paper tend to deceive? Does the custom of putting it in the market places tend to destroy confidence? The transaction of business is dependent on credit; the basis of credit is confidence. The harmful effect of flooding the channels of commerce with checks and drafts of this character is manifest; it is not restricted to the bare transaction between the maker and the payee; its scope embraces the endorsement and the unrestrained transfer of the paper, releasing it as "a courier without baggage" hastening perchance to the four corners of the country. The offense consists, not in presently obtaining something of value by deceit, but in putting in circulation worthless commercial paper which will ultimately result in financial loss. If we close our eyes to this significant fact we shall fall into the patent error of trying to apply to the case before us the law as announced upon an entirely different state of facts in such cases as *S. v. Griffin,* 154 N. C., 611, and *Minton v. Early,* 183 N. C., 199.

True, this Court has never held that the mere giving of a worthless check or draft is a breach of the criminal law. The constitutionality of C. S., 4283, or Public Laws 1925, ch. 14, now repealed, has never been determined. *S. v. Edwards,* 190 N. C., 322; *S. v. Corpening,* 191 N. C., 751. But the act of 1927 comprises much more than the giving of worthless paper. The offense is complete only when a check or draft is made or drawn, etc., on any bank or depository for the payment of money or its equivalent by one who *knows* at the time that he has not sufficient *funds in or credit with such bank or depository* with which to pay the paper when presented—"credit" meaning an arrangement or understanding with the bank or depository for the payment of the check or draft.

Can it be said that the issuance of a check or draft under these circumstances is not a false representation of a subsisting fact—the wrong which the statute condemns? Can the maker condone his act on the theory that he did not mean what he said? By the act of issuing the paper does he not aver the existence of funds or credit against which it is drawn? Can a fraudulent act be defined only by the use of the word "fraud"? We have understood the principle to be that in creating an offense the Legislature may define it by a description of the specific act, or as an act which produces or is calculated to produce a described result. 16 C. J., 67. The result contemplated is financial loss. If there be no immediate loss the probability of ultimate loss is sufficiently imminent to warrant the exercise of the police power in behalf of the public good.

A statute almost identical with ours was construed by the Kansas Supreme Court in *S. v. Avery,* 23 A. L. R., 453. There the first count of the information was based on a check to the Dodge City Wholesale Grocery Company for $133.44. To this count the defendant pleaded guilty and moved in arrest of judgment on the ground that the count did not state facts sufficient to constitute a public offense. The motion was denied and on appeal the ruling was affirmed, the Court saying: "The worthless check must be wilfully drawn, knowing at the time there are no funds on deposit to meet it. Beyond that, the Legislature may, for protection of the public interest, require persons to act at their peril, and may punish the doing of a forbidden act without regard to the knowledge, intention, motive or moral turpitude of the doer. There is no constitutional objection to such legislation, the necessity for which the Legislature is authorized to determine."

With respect to the question of imprisonment for debt it was said: "The defendant contends the statute is in conflict with paragraph 16 of the Bill of Rights, which forbids imprisonment for debt except in case of fraud. It is said the check was given to pay an acknowledged debt, long past due, and neither debtor nor creditor made or lost anything, but the debtor must be imprisoned because the debt was not discharged by the check. The information does not disclose the consideration for the check. It may be conceded, however, the statute applies to a transaction of the character described. Nevertheless, the statute does not impose imprisonment for debt. This subject was considered by the Supreme Court of Georgia, in the case of *Hollis v. State,* 152 Ga., 182, 108 S. E., 783. The Constitution of the State of Georgia declares 'there shall be no imprisonment for debt.' The Worthless Check Act of 1919 resembles the statute of this State, except that the check must be drawn with intent to defraud. The Court said the drawer of the check is not imprisoned for debt, but for fraud, and cited the case of *Smith v. State,* 141 Ga., 482, 81 S. E., 220, Ann. Cas. 1915 C, 999. In the cited case, the Court had under consideration the act designed to punish fraudulent practices in obtaining board, lodging, and other accommodation at hotels, inns, boarding houses, and eating houses, and held imprisonment was not imposed for debt, but for the forbidden practices. Under the statute of this State, the offense does not consist in nonpayment of debt, but in resorting to a practice which the Legislature regarded as demoralizing to business." See *S. v. Torrence,* 127 N. C., 550.

The conclusion was that the offense was not committed against the payee of the check only, but consisted in the public nuisance resulting from the practice of putting worthless paper in circulation. This, it would seem, is the accepted position. In the annotation following the case, it is said: "Apparently very few cases have passed directly upon the constitutionality of statutes making it a criminal offense to issue a check without funds to meet it; but the decisions which have been found all upheld such statutes against such constitutional objections as have been made." The decision (it was said) that the wrong need not have resulted in immediate loss rests upon the theory that for the protection of the public interest the Legislature may require persons to act at their peril and may punish the doing of a forbidden act without regard to moral turpitude. Annotation, *S. v. Avery, supra.*

Many of the cases on which the appellant relies construe statutes in which by express words the criminal intent is required to be shown; our statute has no such requirement; it provides that the making or the issuing of a worthless check or draft by a person who knows that it is worthless is itself an act of such potential evil as to demand its suppression by the exercise of the police power which is inherent in the State. Statutes manifesting an exercise of this power have defined as misdemeanors a variety of acts performed without regard to a specific criminal intent. See C. S., 4429, 4466, 4467, 4709, 4737, 6648; *S. v. Yopp,* 97 N. C., 477; *S. v. Moore,* 113 N. C., 698; *Shelby v. Power Co.,* 155 N. C., 196.

It is possible, of course, to depict evils which may spring from the statute and to overlook those which may result from a deluge of valueless commercial paper; but we must assume that the probable effects of the statute were apprehended by the law-making body from which it derived its vitality. Indeed, in the preamble to the statute the evils already experienced are declared to be "the circulation of worthless paper, overdrafts, bad banking, check kiting, and a mischief to trade and commerce."

Bills of exchange are now regarded as representing so much money and as performing the functions of paper currency. They are an indispensable agency in the maintenance of commerce; and in the proportion in which they are spurious the expansion of trade will unavoidably be retarded. These instruments of business intercourse should command public confidence. We are not at all inclined to predict the ultimate effects of the pernicious practice to which we have referred, but it may not be unwise to bear in mind Macaulay's observation in reference to the "clipped coin of the realm": "When the great instrument of exchange became thoroughly deranged, all trade, all industry, were smitten as with a palsy." His. Eng., Vol. 5, page 87. The judgment is

Reversed.

STACY, C. J., concurring: The uttering of a worthless check, *scienter,* is both a private and a public wrong, like the passing of a counterfeit coin. And herein lies the distinction between the case at bar and *S. v. Griffin,* 154 N. C., 611, which arose under C. S., 4281, a statute purporting to make it unlawful for a tenant wilfully to fail to carry out his agreement with the landlord, after obtaining advances under promise to work, etc., and *Minton v. Early,* 183 N. C., 199, which arose under C. S., 4480, a statute purporting to make it unlawful for a tenant wilfully to abandon his crop, etc.

The present statute is aimed at a practice which has become a menace to trade, an evil and a mischief in the field of commerce, where the major portion of business is done on paper. A check is a negotiable instrument and passes readily through the channels of commerce because of the faith and confidence which those in the market-places are willing to repose in its maker, and it is a crime, an injury to society, to undermine, in any degree, the very foundation upon which all credit rests. It is to the welfare of the State that such faith and confidence should be encouraged rather than destroyed. And so the statute is written.

"A check is a bill of exchange, and may more particularly be defined as a written order on a bank or banker, purporting to be drawn against a deposit of funds, for the payment, at all events, of a sum of money to a certain person therein named, or to him or his order, or to bearer, and payable on demand"—*Walker, J.,* in *Trust Co. v. Bank,* 166 N. C., p. 118.

It is not only a wrong to the payee, but also an injury to the public, for a person to draw a check on a bank, or other depository, and deliver it to another, intending thereby to make a payment of money or its equivalent, knowing at the time that he "has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation" (an important provision of the statute), and it is the avowed purpose of the Legislature to put an end to the practice. It is not the attempted payment of a debt that is condemned, but the giving of a worthless check and its consequent disturbance of business integrity. That the Legislature has the power to enact the law, may not be altogether free from difficulty, nevertheless, the doubt, if any, it seems to me, should be resolved in favor of the validity of the statute. *S. v. Revis,* 193 N. C., 192. It certainly is good morals and I think it is good law.

The "check flasher" does a great deal more than contract a debt; he shakes the pillars of business; and, to my mind, it is a mistaken charity of judgment to place him in the same category with the honest man who is unable to pay his debts, and for whom the constitutional inhibition against "imprisonment for debt, except in cases of fraud" was intended as a shield and not a sword.

In *S. v. Torrence,* 127 N. C., 550, the act of 1879, section 1027 of The Code, now C. S., 4282, which provides that if any person shall obtain advances on a written representation that he is the owner of specific personal property, which he agrees to apply to the payment of said advances, and fails to do so, shall be guilty of a misdemeanor, and punishable, was upheld against an attack upon the ground that it was in conflict with the provision of the Constitution, forbidding imprisonment for debt except in cases of fraud, the court saying: "It is not the failure to pay the debt which is made indictable, but the failure to apply certain property which, in writing, has been pledged for its payment, and advances made on the faith of such pledge." The present statute stands on the same footing.

The mere drawing and delivery of a check to a third person, without more, is equivalent to a representation that the drawer has funds or credit in the bank, sufficient to insure payment on presentation, and if known to be untrue, is a false pretense. Note, 17 L. R. A. (N. S.), 244, citing many cases; Note, Ann. Cas., 1916 E, 736. This is the practice against which the statute is aimed.

The issuing of a check on any bank or depository, for the payment of money or its equivalent, when the maker or drawer knows that he has not sufficient funds on deposit in, or credit with, such bank or depository with which to pay the same upon presentation, if done with intent to defraud, would involve moral turpitude and may justly be called *malum in se.* In the absence of an intent to defraud, it may not be *malum in se;* but where the statute makes such an act a misdemeanor, regardless of the intent, other than the intent to do the act forbidden, it is *malum prohibitum,* and I think within the power of the Legislature to enact.

A wilful purpose, or an evil intent, is indispensable to a conviction of a crime which is morally wrong. But no evil intent is essential to an offense which is a mere *malum prohibitum.* The will to do the act forbidden by the statute is the only criminal intent requisite to a conviction of a statutory offense which is not *malum in se. S. v. McBrayer,* 98 N. C., 619; *Armour Co. v. U. S.,* 153 Fed., 1, affirmed, 209 U. S., 56; 16 C. J., 76; I Bish. Cr. Law (9th ed.), sec. 206a.

It can make no difference whether we, as individuals, think ill or well of the manner in which the Legislature has dealt with a given subject, for, so long as the law-making body stays within the bounds of the Constitution, its acts are free from judicial interference. *Muskrat v. U. S.,* 219 U. S., 346. It is only when the General Assembly exceeds the grant of legislative authority, made to it in the organic law, or disregards one or more of the inhibitions contained therein, that the courts are directed to restrain its action. *Person v. Doughton,* 186 N. C., p. 725.

The courts are limited to the exercise of judicial power by the same instrument which limits the Legislature to a given field of operation.

R. R. v. Cherokee County, 177 N. C., 86. Unconstitutional acts of the Legislature may be rendered harmless by the courts in individual cases, when properly presented, but for the courts to strike down valid acts of the Legislature would be wholly repugnant to, and at variance with, the genius of our institutions. For this reason, every presumption is indulged in favor of the validity of an act of the law-making body. *Adkins v. Children's Hospital,* 261 U. S., 525.

True, the Constitution is not to be honored in form and disregarded in substance. "But the same rule of construction which commands that effect should be given to the constitutional will of the people, to its full extent, without regard to verbal subtleties, equally forbids that we should interpolate into the Constitution what the people did not will, by an artificial and technical stretching of their language beyond its ordinary, popular and obvious meaning"—*Gaston, J.,* in *S. v. Manuel,* 20 N. C., p. 154.

It may not be amiss to observe, in passing, that the statute is not as all-embracing, nor is the opinion of the Court as far reaching, as some of the illustrations made, and fears expressed, in the defendant's behalf.

I concur in the judgment of the Court holding the present enactment to be within the constitutional power of the Legislature.

CONNOR, J., concurring: The only question presented for our decision by the appeal in this case, is, whether the General Assembly of this State has the power to declare, by statute, that "it shall be unlawful for any person, firm or corporation to make, draw, utter, or issue and deliver to another any check or draft on any bank or depository for the payment of money or its equivalent, knowing at the time of making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker, or drawer thereof, has not sufficient funds on deposit in, or credit with such bank or depository with which to pay the same upon presentation," and to prescribe that "any person, firm, or corporation violating any provision of this act shall be guilty of a misdemeanor."

The policy or impolicy of this statute is, manifestly, not for the consideration of this Court. Our jurisdiction, which is derived from and limited by the Constitution of this State (Art. IV, sec. 8) does not extend to or embrace matters of policy, these being exclusively within the power of the General Assembly, with whom all legislative authority is vested (Art. II, sec. 1) subject only to restrictions imposed by the people of North Carolina, in the State Constitution and by the people of the United States in the Federal Constitution. *S. v. Revis,* 193 N. C., 192; *S. v. Lewis,* 142 N. C., 626. It is only when the General Assembly undertakes to exceed its legislative authority as restricted by the Constitution, either of the State or of the United States, that this Court has or assumes jurisdiction to adjudge its statutes invalid for want of power to enact the same.

In these instances, which have been rare, it is within the power as well as the duty of this Court to exercise its jurisdiction, and thus to perform one of the highest and most delicate functions of the judicial department of a government founded upon a written Constitution. *Person v. Doughton,* 186 N. C., 725. In the rare instances in which this Court has been called upon to perform this function, it has ever been mindful of the words of *Gaston, J.,* in his opinion, written in 1838, in the case of *S. v. Manuel,* 20 N. C., 144. The question presented for decision in that case was the same as that which we are now called upon to decide. He says: "Every case seriously questioning the constitutionality of a statute is entitled to the most deliberate consideration, because it invokes the exercise of the highest and most delicate function which belongs to the Judicial Department of the Government. The case before us not only seriously raises this question, but raises it upon grounds so plausible at least, if not so strong, as to render a full examination of them a task of some difficulty. We have therefore felt it our duty to examine the question with diligence and care, and if the conclusion to which we have arrived be not right, the error will not have resulted from the omission of our best efforts to form a correct judgment." This task has been so well and fully performed for the Court by *Justice Adams* in this case that but little remains to be said in support of our decision. But for the vigor with which our brethren, who find themselves unable to concur in the decision, support their dissents, and but for the earnestness with which they express their views, I should be content to say no more, confident that our decision is fully supported by the authorities, and is in full accord with well-settled principles of law.

The power of the General Assembly, in the exercise of its legislative authority, to prohibit by statute an act or acts, therein defined as a crime, and to prescribe punishment for the violation of such statute, is inherent. 16 C. J., p. 60, sec. 14. Such power is limited, with respect to any particular statute and also with respect to the punishment to be inflicted upon one who violates the same, only by constitutional restrictions. Wherever by reason of changes in social conditions, the General Assembly deems an act or acts, theretofore not prohibited by statute, hurtful to the public, and mischievous in effect, it not only has the power, but it is its manifest duty to declare such act or acts unlawful, and to prohibit the doing of the same by statute, in which punishments are prescribed for its violation. It is provided in the Constitution of this State that in order that grievances may be redressed, and the laws amended and strengthened, elections shall be often held (Art. I, sec. 28) and that the General Assembly shall meet in regular session, biennially. These provisions are in accord with a sound principle of government. Reference to chapter 82, of the Consolidated Statutes of 1919, entitled "Crimes and Punishments," and amendments thereto, and to the Public Laws, since enacted and published, will disclose that the General Assembly has exercised this power, and performed this duty. Many acts are now defined as crimes and punished as such, which under social conditions which formerly obtained in this State, were done with impunity. But for this power which the General Assembly exercises in its best judgment, with ultimate responsibility only to the people of the State, the criminal law would be static, and not progressive, as it is and should be.

It is said, however, that the General Assembly was without power to enact chapter 62, Public Laws 1927, entitled "An act to prevent the giving of worthless checks," because the enforcement of said statute against one who shall violate its provisions, will result in imprisonment for debt, contrary to the provisions of section 16 of Article I of the Constitution, which declares that "there shall be no imprisonment for debt in this State, except in cases of fraud." It is conceded, of course, that the word "fraud" does not appear in this statute. If, however, the validity of the statute depends upon whether it shall be construed as requiring that a fraudulent intent be proved before there can be a conviction, and punishment by fine or imprisonment (C. S., 4173, *S. v. Manly*, 95 N. C., 661), this objection is not upon sufficient grounds to require us to hold that the statute is void. The act which is made unlawful, and defined as a misdemeanor, is the giving of a check, with knowledge at the time of giving, that the drawer has not sufficient funds on deposit in or credit with the bank for the payment of the same. A check is defined in *Trust Co. v. Bank,* 166 N. C., 112, in the opinion of *Walker J.,* as "a written order on a bank or banker, purporting to be drawn against a deposit of funds, for the payment, at all events, of a sum of money to a certain person named therein, or to him or his order, or to bearer, and payable on demand." A check is a bill of exchange drawn on a bank, payable on demand. C. S., 3167. It is, on its face and by its very nature, a representation to every person who may take it or deal with it, as payee, endorsee or holder, that funds have been provided by deposit or by credit with the drawee bank, for its payment on presentation. In law, as well as in every-day business, there is a representation, not only that the drawee bank will pay the check upon due presentation, but also that funds are in its hands, or that credit has been arranged with it, for such payment. The representations, express or implied, made by the drawer of a check on a bank or banker include more than the representations made by the drawer of a draft on a drawee, who is not a bank or banker; the latter engages with the payee and successive holders only that the draft will be accepted or paid, or both, by the drawee, while the former represents that he has funds with the drawer out of which the check will be paid, at all events. While there is no distinction in the ultimate liability of the drawer of a check on a bank, or banker, and the drawer of a draft upon one who is neither, there is a distinction, recognized in the business world between the representations made by such drawers. The statute involved in this action recognizes this distinction, and it may well be held that in prescribing punishment by fine or imprisonment for its violation, it comes within the exception to the principle contained in section 16 of Article I of the Constitution. There can be no conviction, resulting in punishment by imprisonment, for the violation of this statute, without proof, not only that the accused gave the check, but also that he knew that the representation that he made thereby was false. The giving of the check with such knowledge is a fraud for which a defendant in a criminal action, who has been duly convicted, may be punished by imprisonment, without impinging upon the sound and just principle stated in section 16 of Article I of the Constitution.

This principle was included in our bill of rights, and has remained therein, not as a limitation upon the power of the General Assembly with respect to the enactment of criminal statutes, with adequate provisions therein for the punishment of those who violate them, but for the purpose of prohibiting the issuance of executions against the person, as allowed at common law, upon judgments recovered by creditors against debtors. It was the evil flowing from the issuance of such executions that the people of North Carolina thereby declared should cease. At common law executions in actions where money only was recovered as a debt or damages for the breach of a contract, were of five sorts: (1) against the body of the defendant; (2) against his goods and chattels; (3) against his goods and the profits of his land; (4) against his goods and the possession of his land; and (5) against all three, his body, land and goods. Blk. Com. Vol. III, ch. XXVI. The first of these executions was by writ of *capias ad satisfaciendum.* This latter writ is said by Blackstone to be an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded. By means of this writ, a debtor could be imprisoned at the instance of his creditor. Notwithstanding section 39 of the Constitution of North Carolina, adopted in 1776, such an execution was allowed in this State prior to 1868. However, since the adoption of the Constitution of 1868, containing section 16 of Article I, no judgment creditor has had the power to procure the arrest and imprisonment of his debtor by an execution against his person, on a judgment for debt arising out of contract, unless fraud was alleged and proved, with respect to the debt. Statutes have been enacted by the General Assembly and are now in full force in North Carolina, guaranteeing unfortunate debtors that they shall not be imprisoned solely because they are unable to pay their debts. In my opinion, no criticism can be justly made of the General Assembly of 1927, here or elsewhere, for that they have violated a fundamental provision of our bill of rights, by the enactment of chapter 62, Public Laws 1927. This statute, as is now held by this Court, is valid. It was enacted by the General Assembly in the exercise of its legislative authority for the protection of the public from an evil which it declared has arisen in North Carolina by reason of modern methods of doing business. The power of the General Assembly to enact the statute is not within the restrictions imposed thereon by constitutional provisions. I concur in the decision upon the question presented to the Court by this appeal.

BROGDEN, J., dissenting: This case has been considered with great deliberation by the Court, but I find that my mind cannot reach the conclusion set forth in the opinion nor approve the reasoning through which the result is achieved. The Constitution of North Carolina, Article I, sec. 16, provides "that there shall be no imprisonment for debt in this State, except in cases of fraud." The reverse of the proposition is that there can be imprisonment for debt in this State "in cases of fraud." At the outset, therefore, the inquiry is, what is the meaning of the constitutional expression "in cases of fraud"; or to state the proposition differently, what is the meaning of fraud as contemplated by the Constitution, which will warrant and justify depriving a citizen of his liberty?

Fraud, as contemplated by the Constitution, has not been left to conjecture or supposition. Shortly after the instrument was forged and while hot and fresh, this Court interpreted and set in legal concrete the meaning of fraud as contemplated therein. *Pearson, C. J.,* writing in *Moore v. Mullen,* 77 N. C., 328, says: "And it is clear that the words 'except in cases of fraud' are evidently used in a very restricted sense, such as fraud in procuring a contract to be made, or fraud in attempting to evade performance—as by concealing property, or by attempting to run it out of the State, or by making a fraudulent disposition of it." The same definition was given by *Chief Justice Pearson* in *Melvin v. Melvin,* 72 N. C., 384.

Let it be observed that the definition of fraud as contemplated by the Constitution is not a mere sugar-coated and emasculated misrepresentation, but fraud "in a very restricted" sense in either procuring a contract or evading performance in the manner specifically pointed out by

Chief Justice Pearson. If, then, these decisions correctly state the law and are to be considered binding, then the absence of such fraud is fatal to imprisonment for debt.

As I conceive the law, the identical proposition, in principle, was decided in *S. v. Griffin,* 154 N. C., 611. The statute under consideration in that case carried the words "with intent to cheat and defraud another . . . shall obtain any money, etc., from any other person . . . by color of any promise or agreement that the person making the same will begin any work, etc., and shall unlawfully and wilfully fail to commence or complete said work according to the contract, without a lawful excuse, he shall be guilty of a misdemeanor." The statute was amended to provide: "And evidence of such promise or agreement to work, the obtaining of such advances thereon and the failure to comply with such promise or agreement shall be presumptive evidence of the intent to cheat and defraud," etc. The opinion of the Court declares: "It is a part of the organic law of this State that there shall be no imprisonment for debt except in cases of fraud. The bald fact that a person contracted a debt and promised to pay it in work, standing alone, does not justify a presumption of fraud in contracting the original debt, any more than it would if he had promised to pay it in money. It is beyond the power of the Legislature to create such a rule of evidence and enforce it in the State's own courts. It is but an arbitrary mandate, there being no rational connection, tending to prove fraud, between the fact proved and the ultimate fact presumed. Such an arbitrary rule of evidence takes away from the defendant his constitutional rights and interferes with his guaranteed equality before the law, and, as the Supreme Court of the United States says, 'violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law.'" To the same effect is the utterance of *Hoke, J.,* in *Minton v. Early,* 183 N. C., 199. "But, in our opinion, the statute referred to, imposing as it does punishment of fine and imprisonment for abandoning a tenancy or crop, without paying for the advances made by the landlord, and without requiring any allegation or proof of fraud, either in the inception or breach of the contract, is in violation of our constitutional provision, Art. I, sec. 16, which inhibits 'imprisonment for debt except in cases of fraud.'"

However, the opinion of the Court says: "The offense consists not in presently obtaining something of value by deceit, but in putting in circulation worthless commercial paper which will ultimately result in financial loss. If we close our eyes to this significant fact, we shall fall into the patent error of trying to apply to the case before us the law as announced upon an entirely different state of facts in such cases as

S. v. Griffin, 154 N. C., 611, and *Minton v. Early,* 183 N. C., 199." According to this proposition, the crime consists of two elements, to wit: (1) Issuing and delivering a worthless check; (2) ultimate financial loss.

A check by its very nature is an evidence of indebtedness and as between the drawer and payee, the equivalent of the drawer's promise to pay. A worthless check is then at most a false promise or a false representation. Now what was the gist of the offense in the *Griffin case?* (1) Procuring something of value. (2) By a false promise or false representation, to wit, to begin work for the promisee, and (3) immediate financial loss. Although there was a false promise or false representation resulting in immediate financial loss, this Court held the legislation unconstitutional. Yet in the present case a false promise or false representation resulting in hypothetical financial loss, even though nothing of value was procured or received at the time of the uttering thereof, is held valid and constitutional.

I am inclined to think that the "patent error" referred to in the opinion of the Court consists in the failure to recognize what the politicians might term, the "deadly parallel" between the *Griffin case* and the case at bar.

But says the Court: "Can it be said that the issuance of a check or draft under these circumstances is not a false representation of a subsisting fact—the wrong which the statute condemns?" "False representation of a subsisting fact" is false pretense. If so, the statute is a useless legislative performance because C. S., 4277, defining and punishing that crime, is already in full force and effect. Again, if false pretense is "the wrong which the statute condemns" then it must be an essential element of the crime, and, if so, it ought to be alleged in the indictment and proved at the trial. The statute itself, however, contains no language specifying either false pretense or fraud. Is it not therefore apparent that the Court by construction and interpretation is thrusting into the statute the necessary legal elements, and thereby forging and fashioning a totally new law?

If the bad-check law really means that a person who issues and delivers a worthless check is actually guilty of false pretense, then why not so declare and require the State to allege and prove the commission of the real crime for which a defendant is to be tried? Ought a citizen of this State to be convicted of a false pretense without requiring the essential elements of the crime to be established? If so, the law itself sets the example of subterfuge in its own tribunals.

However, it is contended that the bad check law can be upheld upon two grounds:

1. That imprisonment for debt is not involved, but the giving of a worthless check, which is a separate and distinct criminal act.

2. That such legislation can be supported and justified under the police power.

In discussing the first contention, it must be borne in mind that the facts in this case show that the check for $100 was given to pay a debt then existing. Nothing of value, so far as the record discloses, passed to the defendant at the time of giving the $100 check. While it is debatable in my mind, under our decisions, as to whether the receiving of value at the time of giving the check and upon the faith of the check, is not essential to uphold conviction, still it must be apparent that in this particular case the debt lies upon the threshold of the indictment.

What is the meaning of the expression "for debt"? The word "for" is generally understood in law to mean "on account of," or "growing out of." Words and Phrases, Second Series, Vol. 2. In the light of this definition, Art. I, sec. 16, of the Constitution would read substantially as follows: "There shall be no imprisonment on account of or growing out of a debt in this State, except in cases of fraud."

Does the transaction for which the defendant is indicted "grow out of" a debt or arise "on account of" a debt? Suppose the defendant had written a dozen checks and passed them out to his friends to whom he was under no legal obligation, would anybody contend that the mere drawing and delivering of these checks constituted a crime for which he would be imprisoned? I think not. What is it then that creates the crime? Obviously the drawing and delivering of the check to a creditor. The debt, therefore, becomes the foundation of the offense. It is the breath of life to the crime, and without it the crime could not exist. The debt and the crime are as closely associated as bone and marrow or lungs and breathing. Neither can function without the other. So that the effort to insert the judicial operating knife between these two inseparable facts, each giving life and vitality to the other, is to my mind, simply "dividing a hair twixt South and Southwest side." Let it be borne in mind, too, that as a result of this infinitesimal division, a citizen can be deprived of his constitutional liberty, which, under all established principles of law, is entitled to every reasonable inference in its favor.

It could have been argued with equal, if not greater force, in the *Minton case* that the penal statute was not intended to make a tenant pay for advances, but to punish an entirely separate and distinct offense, to wit, that of abandoning a crop and subjecting the landlord to financial injury through the probable loss of the crop. Moreover, the same reasoning could have been applied with greater force to the *Griffin case* upon the theory that the statute was not intended to imprison a tenant for debt, but to punish his gypsy propensities in wandering about the country, abandoning crops to the mercy of wind and weather and thus subjecting the landlord to probable financial loss, and establishing a practice destructive of agriculture.

The principle of *scienter* cannot save the day. *Scienter* is a technical term denoting in the law of fraud a guilty knowledge, and so far as I can discover, is confined to the field of civil actions for fraud and has never been used as a substitute for that evil intent of the mind upon which all crime rests. Indeed in a civil action for fraud the fraudulent intent is an essential to liability. In the very last utterance of this Court upon the subject in *Corley Co. v. Griggs,* 192 N. C., 173, *Clarkson, J.,* writing for the Court, quoting from Pollock on Torts, says: "To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement *all the following conditions must concur* (italics mine): (a) It is untrue in fact. (b) The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not. (c) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it. (d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage." Thus it appears that *scienter* alone without the fraudulent intent does not even establish a cause of action in a civil case, and yet it is held to be sound law in the case at bar that mere *scienter* without the intent to deceive is sufficient to establish a crime. In other words, the natural order of the law is reversed and a crime can be established upon less proof than a cause of action in a civil case.

Nor will the analogy of the "clipped coin of the realm" avail. Clipping the coinage or counterfeiting is not now and never has been a crime growing out of or connected with a debt or in anywise possessing any relationship whatever to a contractual obligation. Neither can the doctrine of *malum prohibitum* control, for the plain reason that the Legislature has no power to declare the failure to pay a debt *malum prohibitum,* and thus by indirection nullify the plain guarantee of the Constitution.

Again, the bad check law, as drawn, does not even establish a tort. If the prosecuting witness in this case had sued the defendant upon the check, alleging in the words of the statute that the defendant gave him the check "knowing at the time that he had no funds in bank to pay the same upon presentation," and then should submit an issue to the jury in the words of the statute, "did the defendant give said check 'knowing at the time' that he did not have sufficient funds on deposit to pay same"? and the jury should answer this issue yes, I assume that there is not a judge in the State who would sign a judgment in the action, decreeing the arrest of the person of the defendant. And yet, by the simple device of turning the guns of the criminal law upon either a crooked or unfortunate debtor, irrespective of good faith, he can be sent to the chain-gang for a transaction for which he could not even be arrested in a civil case. This result sweeps away all the landmarks set by our fathers establishing the boundaries of constitutional liberty, and I cannot believe that it is sound law.

The second ground upon which this legislation is sought to be upheld is through the exercise of police power. It must be conceded that the police power is an indefinable, intangible, illusive and elusive, all-covering mother-hubbard of the law. Under the complex conditions of modern society, where rights and duties overlap and interlock the police power is an essential attribute and function of sovereignty, subordinating individual convenience and individual rights to the dominant welfare of the public. But, however potent the police power may be, it is not superior to the Constitution, and when the Constitution speaks it must hold its peace. If the bad check law is unconstitutional, that ends the controversy and there can be no police power involved. Obviously the police power cannot push the Constitution from its throne as the supreme authority in this State, because the police power must be treated as the handmaid of the Constitution and not an indirect device, undermining and overthrowing the highest expression of the organic law.

It is to be noted that the opinion of the Court declares that "we recognize the principle that the police power may not be exercised in breach of rights which are guaranteed by the Constitution." But a perusal of the opinion will clearly disclose that while the principle may be recognized it is not applied because one of the main theories for upholding conviction rests upon the exercise of police power in suppressing a *practice* which is supposed to corrupt the morals of the State.

Of course the preamble of the act contains a galaxy of descriptive adjectives, but these mean nothing as the body of the act is plain and unambiguous. These adjectives simply constitute the baby-ribbon, tissue-paper and sprigs of holly which conceal the "Christmas present" contained in section 1 of the act.

The question which we are considering has been considered in many other jurisdictions, notably South Carolina, Vermont, Georgia, California, Ohio, Arizona, Kansas, Florida, Washington, Louisiana, Maryland, Oklahoma, New York and South Dakota. *S. v. Moore* (S. C.), 122 S. E., 672; *Lowell v. Eaton* (Vt.), 122 Atl., 742; *Berry v. State* (Ga.), 111 S. E., 669; *People v. Khan* (Cal.), 182 Pac., 803; *S. v.*

Lowenstein (Ohio), 142 N. E., 897; *S. v. Meeks* (Ariz.), 247 Pac., 1099; *S. v. Avery* (Kansas), 207 Pac., 838; *Wolfe v. State* (Fla.), 79 Southern, 449; *S. v. Pilling* (Wash.), 102 Pac., 230; *S. v. Alphonse* (La.), 98 Southern, 430; *Lyman v. State* (Md.), 109 Atlantic, 548; *Kilgore v. State* (Okla.), 219 Pac., 160; *People v. Siman* (N. Y.), 197 N. Y. S., 713; *S. v. Taylor,* 44 S. Dak., 335. There is also an interesting note on the subject in the N. C. Law Review of December, 1926, and also an article on imprisonment for debt in North Carolina, 1 N. C. L. Rev., 229. The statutes of all the States referred to, except Kansas, Vermont and South Dakota, contain the words "with intent to defraud" or similar language.

The South Dakota statute contains the words "every person who designedly by color or aid of any false token or writing . . . obtains . . . any money or property is punishable," etc. This statute, of course rests upon the theory of false pretense and applies only to securing something of value at the time the check is given.

In *S. v. Alphonse, supra,* the Louisiana Court said: "In prosecutions under this statute, one of the essential ingredients of the crime is *fraudulent intent.* It is sacramental that an *intent to defraud* be alleged and proved." In the note upon the subject, 23 A. L. R., 459, the author says: "But in *Neidlinger v. State,* 17 Ga. App., 811, 88 S. E., 887, it was expressly held, in direct conflict with *S. v. Avery,* that unless the statute did require such an intent it would be invalid, since it would be an instrument for the collection of debt by the processes of the criminal law, in contravention of sound public policy and of the constitutional provision against imprisonment for debt." Proceeding further the author says: "The cases of *Hollis v. State* (cited in the opinion of the Court) and *S. v. Pilling* do not expressly declare what would be the effect of failure upon the part of the Legislature to make criminal intent an element of the offense, but the inference clearly is that it is the element of fraudulent intent which relieves the statutes of the constitutional objection that they authorize imprisonment for debt."

The South Carolina statute originally did not require the presence of fraudulent intent, but this was added in 1923.

The Georgia Court in *Berry v. State, supra,* referring to the statute in force in that State says: "This act still makes the intent to defraud an essential element of crime defined in this section thereof. Without such intent no crime is committed, and where the evidence introduced by the State negatives the presumption created by this section, there can be no conviction. . . . The evidence for the State disclosing that there was no intent to defraud the payee of any right, property, money, or other thing of value, the defendant should not have been convicted, although he falsely stated before he gave his check that he had put funds in the bank to meet the same. The court erred in not granting a new trial."

The Vermont statute provides that if a person shall issue a check "knowing at the time of such making" he has not sufficient funds to pay the check upon presentation shall be liable in action for tort . . . to the person injured thereby and for want of property, the body of the person making . . . such check may be attached."

The Kansas statute is set out in *S. v. Avery, supra.* This case is cited in the opinion of the Court as the controlling authority upon the question. But the Kansas statute also provides that in case a prosecution is begun under the act the defendant may have the action abated by showing that he had an account in the bank thirty days prior to the time the check was drawn, "and that said check or draft was drawn upon said bank without intent to defraud the party receiving same."

So far as my investigation discloses, there is not a statute in the country upon the subject that does not recognize the intent to defraud as an essential element of the crime, and therefore our act stands alone and unsupported in so far as it purports to deprive a citizen of this State of his liberty upon a bald, bare breach of a simple contract.

Under our bad check law, if a person should give a check for $1,000, which he knew would overdraw his account at the bank five cents, and the payee of the check should present it to the bank, and the bank should decline to pay it, he would be a criminal and a candidate for the chaingang, even though he intended to make a deposit within five minutes to cover the check and actually had the money to make such deposit.

Again, under this law as written, if the drawer of the check should notify the payee that the check was not good, but that he, the drawer, would make it good within a few minutes, and the payee should present it to the bank for payment and payment should be refused, the drawer would be a criminal under the law of his State. If the check should be post-dated, the same result would follow, for the reason that the opinion of the Court in this case declares in substance that the gist of the offense is giving the check which is dishonored by the bank, irrespective of the circumstances, good faith, or present ability of the drawer of the check to make it good by a deposit in the bank.

Undoubtedly the bad check evil is grievous. But the curbing thereof should be accomplished in obedience to the law of the land. While these evils, like the debased coinage referred to by McCauley, may smite industry "as with a palsy," yet I think that a due recognition and application of the constitutional safeguard, in the words of Shakespeare, "makes us rather bear those ills we have than fly to others that we know not of."

I think the act is unconstitutional and therefore a nullity.

If the constitutional provision obstructs the free course of commerce and undermines business confidence and integrity, and is no longer adequate to meet the expanding needs of modern life, then it ought to be repealed and nullified, but this should be done in accordance with law and not by mere judicial construction and interpretation.

CLARKSON, J., concurring in dissent: I concur in the able dissenting opinion of *Mr. Justice Brogden.* It is not metaphysical reasoning or academic discussion or elaborate subtleties of thought and expression; he stands on the bedrock of our government—the Constitution. Article I, sec. 16, says: *"There shall be no imprisonment for debt in this State except in case of fraud."* Our form of government is founded on the consent of the governed, subject to constitutional limitations. The individual, elusive views of judge-made law as to what is and what is not *police power,* has no standing in this forum, when such judge-made power is in direct antagonism of clear language in our Constitution that there shall be no imprisonment for debt except *in case of fraud.* For nearly sixty years this provision has been a bulwark "as the shadow of a great rock in a weary land" to the poor debtor against the greedy creditor. We need, as never before, in this age of wheels and wings, fast living and extravagance, to get back on the ground of old-time common honesty, but the medicine here is worse than the disease—a term on the chain-gang up to two years or fine in the discretion of the court, for nonpayment of a debt. C. S., 4173. This is the meaning, pure and simple, of this act, in the very teeth of the Constitution. The wise lawwriter, thousands of years ago, has written to meet the condition that was known then and would continue through the ages to come, said: "For the poor shall never cease out of the land; therefore I command thee, saying, Thou shall open thine hand wide unto thy brother, to thy poor, and to thy needy, in thy land."

It is well settled in this State that the "check flasher" can be punished. It is he who *obtains at the time money* or *other things of value* and gives a worthless check *"with intent to cheat and defraud another."* C. S., 4283; *S. v. Freeman,* 172 N. C., 925. In cases of this kind, all the elements of deceit and fraud must be proven. This has been the universal and accepted law here and elsewhere.

The United States Supreme Court, in the well known case of *Bailey v. State of Alabama,* 219 U. S., 219, holds: "Although a state statute in terms be to punish fraud, if its natural and inevitable purpose is to punish crime for failing to perform contracts of labor, thus compelling such performance, it violates the Thirteenth Amendment and is unconstitutional."

The only statute in this country that has some semblance to the present statute is Kansas—construed in *S. v. Avery,* but even that statute gives a merciful day of grace. Section 3 provides upon prosecution before trial the action can be abated by showing that he had an account in the bank on which the check was drawn 30 days prior to the delivery of the check, *"and that said check or draft was drawn upon said bank without intent to defraud the party receiving same."*

North Carolina is first in many notable and laudable things; now this mother and protector of all her people, by the majority opinion, stripped of verbiage, it is made a crime, contrary to the constitutional inhibition, not to pay a debt. Let us analyze. The check-flasher is now punished, and rightly so. He obtains a thing of value by fraud. The present act admittedly is for the purpose of collecting by imprisonment, or threat of such, a past due obligation because it is represented by a *check* or *draft.* It is said, in *Markham v. Carver,* 188 N. C., at p. 629, when the fundamental constitutional question, due process of law, arose of taxation without *notice* or *hearing,* "We would be blinded like Samson and perhaps some day pull the pillars of the house down to fall on the poor as well as the rich." In that case, it was about to tumble on the rich, and this Court stayed the hand; now it is about to tumble on the poor. It should tumble on neither. The fathers of the Republic required the oath of office, in part, "do equal right to the poor and the rich." This act primarily affects the debtor, the creditor is the beneficiary.

It is conceded by all that if a thing of value at the time it is obtained, a check, or draft, is given with "intent to cheat and defraud" without providing funds in or credit with the bank on which the same is drawn, that this is a crime, and punishable. The party practically steals from a person his personal property and rightly should be punished. But this act is what? A person buys a suit of clothes or other things of value, the seller gives him credit and time to pay it, as is done every day. In fact often, as is right, to sell the merchandise, persuades the person to purchase. It goes without saying an honest person should pay the debt. It so happens, desiring to pay it, he gives a check or draft to the seller, knowing that he has "not sufficient funds on deposit in or credit with such bank" to pay the same. He then becomes a criminal for giving a check or draft for past due indebtedness. The very fact that he gives the check shows that he desires to pay an honest past-due debt. The person to whom he owed the debt is not hurt. He has the same past-due debt that he had before, but this now is a crime. His intent may be to meet the check or draft after it is given before presentation, and peradventure some emergency happens, sickness, deflation in business and many causes arise, that the deposit has not been made; he is a criminal for giving the check or draft, a criminal although honestly trying to pay by check or draft a past due debt he was not bound to give, but voluntarily did so wanting to pay. A person gives a note for a past due debt and he does not pay it at the maturity, although put in the bank, of course no law can make him a criminal. Here he gives a check or draft for a past due debt and has no deposit at the time, although intending to deposit when he makes a check or draft, yet he is a criminal.

Again, in practical experience it will clog and fetter business. The high ideal is that a person should so conduct his business and private life that it is an open book. The searchlight, although it should not, if turned on he has nothing to make him afraid or be ashamed of. One should be obedient to the law of his country, for it is law and orderly government. It is a matter of common knowledge that the eighty-five to ninety per cent of the volume of business is now done, not by cash, but by checks and drafts. The banks open in larger cities at 9 a.m., and close at 2 p.m., and in smaller towns they open at 9 and close at 3 o'clock. The last two banking hours are the heaviest receiving hours for deposit. Merchants and others get checks in the morning mail, or over the counter. These checks will be deposited later in the day; they are good, but he owes others and he cannot *"draw, make, utter or issue and deliver to another any check or draft,"* pay to any person present or send off to a creditor living away, as he knows at the time he hasn't sufficient funds on deposit in or credit with such bank to pay the check or drafts, but will have later in the day when he makes the deposit. Nor can he tell the creditor to hold the check until later in the day when he makes the deposit to meet it. It will paralyze the business man; he must obey the law. But was it made for him? It will catch those of the unfortunate class, but the law-abiding banker, business man, realtor, lawyer and others must obey the law and will be trapped in the meshes of this law, perhaps, set to catch others. No one can but admit it is an evil, but obedience to this law as written to the ordinary merchant and others, all of whom have but small deposits in the bank, will fetter the usual mode of legitimate business and tend to make honest law-abiding citizens criminals.

For example again (applicable to realtors and all sorts of business men): An attorney examines a title to land for one who borrows from the building and loan, banker, or others, who loan on real estate. He finds that there are liens on the property. He must certify that the title is good, and he calls attention to the liens. The parties meet in the attorney's office. The check of the lender, perfectly good, is endorsed to the attorney to see that the liens are paid off. The person who has a mortgage or deed in trust receives a check from the attorney for his debt and the mortgagee or trustee goes over to the register of deeds' office and cancels the lien. The lien of the judgment creditors, laborers, materialmen and others, as the case may be, are paid by check. The attorney usually deposits between 1 and 2 o'clock the lender's check to meet these checks, understood by the parties to pay off the liens on the property. Every time he makes a check and delivers it, he is guilty of a crime. He must quit everything and deposit the lender's check before he can check out the money.

No post-dated check can be given, although absolutely in good faith. No friend can swap checks with another in an emergency, although in good faith.

The passing of a counterfeit coin is destructive of a governmental power. The Constitution of the United States, Art. I, sec. 8 "(5) to coin money. . . . (6) To provide for the punishment of counterfeiting the securities and current coin of the United States." A private check or draft has no similitude to the spurious coin.

It takes the strength of the imagination to conceive that a check is "clipped coin of the realm." The circulation of coin or securities is an inherent and constitutional governmental power. A check is a written order by a private person or corporation, payable usually to a certain person or order and drawn against a deposit of funds in a bank. It is not legal tender. *Ins. Co. v. Durham,* 190 N. C., p. 58. "Coin of the realm" or government securities is legal tender. A depositor is a creditor of the bank and the bank is the debtor. *Corporation Commission v. Trust Co.,* 193 N. C., 696.

The horrors of the debtor's prison has come down to us from ancient oppression; now this act changes the debtor's prison to the chain-gang, with hardened criminals, for a past-due debt, because a check is drawn and issued without fund on deposit or credit with the bank. The framers of the Constitution, to meet the wrong and nuisance of imprisonment for debt, said only in *case of fraud.* The courts are to become collecting agencies for bad debts.

Papers of Archibald D. Murphey, Vol. 2 (Hoyt), note p., 435 *et seq:* "In early time in North Carolina, as elsewhere, any debtor could be imprisoned at the pleasure of his creditor until the debt was paid."

In the History of the Supreme Court of North Carolina, 177 N. C., p. 621, written by *Chief Justice Walter Clark,* speaking to the subject of Judge Archibald D. Murphey, who by special commission sat on this Court: "Judge Murphey has always been very dear to the people of this State. He was the son of Colonel Archibald Murphey, a Revolutionary soldier of Caswell County. He was born in 1777 and graduated at the University of North Carolina with the highest distinction in 1799. From 1812 to 1818 by annual election he was Senator from Orange. *He has the originator of the system of internal improvements and common schools of this State.* He purposed to write a history of North Carolina. In 1818 he narrowly missed election to the Supreme Court, and was chosen to fill one of the vacancies on the Superior Court. His oration before the two literary societies of the University of North Carolina in 1827 was the first of a long series of these and has never been surpassed by any. *Under the common law barbarism of imprisonment for debt, this distinguished man, who reflects so much honor on his State, was for some months in Guilford jail, without any fault on his part.* He died in 1832." See Papers, *supra,* Vol. 2, p. 434, which says: "I apprehend that his too liberal theories were at the bottom of his private affairs, resulting in pecuniary embarrassment and ultimate failure—the end being his incarceration in Guilford jail. I never heard a breath against his integrity. His honor was unspotted. *He was the victim of a law inflicting torture as exquisite to the sensitive soul, if not to the body, as the rack or thumb-screws of the middle ages."* (Italics mine.)

The evil Macaulay speaks of was counterfeiting or mutilating the silver money of the realm. Vol. 5, at p. 88, he says: "But the ignorant and helpless peasant was cruelly ground between one class which would give money only by tale and another which would take it only by weight." At p. 89: "In the midst of the public distress one class prospered greatly, the bankers." At p. 91: "But happily for England there were among her rulers some who clearly perceived that it was not by halters and branding irons that her decaying industry and commerce could be restored to health." The remedy (p. 101): "It was resolved that the money of the kingdom should be recoined according to the old standard both of weight and of fineness; that all the new pieces should be milled; that the loss of the clipped pieces should be borne by the public; that a time should be fixed after which no clipped money should pass except in payment to the government, and that a later time should be fixed after which no clipped money should pass at all." Then: "The advantages of this plan were doubtless great and obvious. It was most simple, and at the same time most efficient. What searching, fining, branding, hanging, burning, had failed to do would be done in an instant."

In this case the lay authority is Goldsmith. The beauty of the philosophy of the life of the Vicar of Wakefield has seldom been excelled. When misfortune and the cunning and unscrupulous creditor had this Vicar imprisoned for debt, he says thus (p. 228): "And it were highly to be wished that legislative power would thus direct the law rather to reformation than severity. . . . (p. 230.) It were to be wished, then, that power, instead of contriving new laws to punish vice, instead of drawing hard the cords of society till a convulsion came to burst them, instead of cutting away wretches as useless, before we have tried their utility, instead of converting correction into vengence, it were to be wished that we tried the restrictive arts of government, and made law the protector, but not the tyrant of the people. We should then find that creatures whose souls are held as dross, only wanted the hand of a refiner; we should then find that wretches, now stuck up for long tortures, lest luxury should feel a momentary pang, might, if properly treated, serve to sinew the State in times of danger; that as their faces are like ours, their hearts are so too; that few minds are so base, as that perseverance cannot amend."

STATE v. A. A. HEGE.

(Filed 9 November, 1927.)

1. **Intoxicating Liquor—Spirituous Liquor—Statutes—Possession — Evidence—Nonsuit—Questions for Jury.**

On a trial under an indictment for violating the Turlington Act (ch. 1, secs. 2 and 10, Public Laws of 1923), charging the unlawful possession of intoxicating liquors, evidence in behalf of the State tending to show that the defendant in erecting a gasoline station some distance from the dwelling in which he lived, and at the time of the search he had concealed on the premises of the gasoline station two barrels, in each of which several gallons of whiskey were found: *Held*, sufficient to take the case to the jury on defendant's motion to dismiss upon the State's evidence: *Held further*, evidence of such possession before the enforcement of the act in question is no defense thereunder.

2. **Same—Unlawful Sale.**

Where on a trial for unlawful possession of intoxicating liquor inhibited under the Turlington Act, there is evidence tending to show that on the premises of the defendant's gasoline station and store two barrels partly containing whiskey were found concealed, buried in the ground and encased in concrete of the same character and material as the filling station, etc., testimony of the officer that the barrels, from the indications, had thus been there since the building of the station and store, is competent as tending to show that the possession of the whiskey was for an unlawful purpose.

3. **Same—Appeal and Error—Harmless Error.**

Testimony in this case that the defendant when arrested for violating the Turlington Act, told the officer arresting him that once he had been an officer of the law, is held under the facts of this case immaterial to the issue, and at most, its admission was error nonprejudicial to the defendant.

4. **Indictment—Intoxicating Liquor — Spirituous Liquor — Sufficiency of Allegations.**

Where the indictment sufficiently charges the offense of the unlawful possession of whiskey under the inhibition of the Turlington Act, a charge negativing the exception making it lawful to have such possession for family purposes, etc., is unnecessary to a conviction. 3 C. S., 3411(b). Turlington Act., sec. 10.

5. **Instructions — Interpretation — Construed as a Whole — Appeal and Error.**

An instruction appealed from should be construed contextually as to its related parts, and not disconnectedly, and error then made to appear.

6. **Criminal Law—Burden of Proof—Reasonable Doubt.**

The reasonable doubt beyond which the State, in a criminal action, must show guilt of the offense charged, is not one which is vain or imaginary, but one based upon reason and arising from the evidence in the case. *S. v. Sigmon*, 190 N. C., 690, cited and approved.

7. **Criminal Law—Evidence—Admissions.**

Where the defendant is indicted for violating the Turlington Act by having the unlawful possession of whiskey, testimony of the officers making the arrest that the defendant said at the time thereof that he had been caught and there was no use to deny it, is competent as an admission of guilt by the defendant.

APPEAL by defendant from *Clayton Moore, Special Judge,* and a jury, at May Term, 1927, of FORSYTH. No error.

The bill of indictment against defendant contained five counts for violation of the prohibition law. The only count that needs to be considered is the fourth, as follows: "That A. A. Hege, late of the county and State aforesaid, on the day and date aforesaid, with force and arms, at and in the county aforesaid, unlawfully did possess intoxicating liquor, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The verdict of the jury was "Guilty," and upon this verdict his Honor pronounced judgment. From the judgment rendered defendant appealed to the Supreme Court.

The material assignments of error and necessary facts will be considered in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
J. D. Slawter and Folger & Folger for defendant.

CLARKSON, J. The State's evidence, stated briefly, showed: The defendant lived about a mile from the city limits of Winston-Salem, on a public road three-fourths of a mile from the Lexington Road. About 100 yards from his residence he had a filling-station and little store. The chief of police of Winston-Salem had a search warrant, and with a deputy sheriff and others searched the store. They found two barrels with whiskey in them in the basement; one barrel had a fraction over two gallons, and one had less than two gallons. The barrels were buried in the ground back of a cement wall 6 feet high, 5 to 6 inches thick, and covered over on top with 4 or 5 inches of dirt. The barrels were concealed. A State's witness testified that defendant stated, "We just caught him; that is all there was to it; there is no use denying it or telling a story about it." The capacity of the barrels was about 30 gallons each. The barrels had a sheet of concrete in front and on top of them, a sheet not so much thicker than your hand, and through this was a bung with a stopper placed in that. The cement wall had to be torn down to get the barrels out. The defendant admitted he put the barrels in at the time the foundation of the store was laid. The defendant introduced no evidence.

"Chapter 1, section 2, Laws 1923 (known as the 'Turlington (or Conformity) Act'), is as follows: 'No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase or possess any intoxicating liquor, except as authorized in this act; and all the provisions of this act shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wines for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of "The Volstead Act," act of Congress enacted 28 October, 1919, an act supplemental to the National Prohibition Act, "H. R. 7294," an act of Congress approved 23 November, 1921.' " *S. v. McAllister,* 187 N. C., at p. 401. See 3 C. S., 3411(b); *S. v. Hammond,* 188 N. C., p. 602; *S. v. Pierce,* 192 N. C., p. 766; *S. v. Mull,* 193 N. C., p. 668.

Evidence tending to show that the defendant had intoxicating liquor in his possession before the passage of the Turlington or Conformity Act, is not a defense under its provisions for the defendant's possession a year thereafter upon an indictment under the act of possessing intoxicating liquors. *S. v. Knight,* 188 N. C., 630.

Section 10 of the Turlington or Conformity Act is as follows: "From and after the ratification of this act the possession of liquor by any person not legally permitted under this act to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this act. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, *provided* such liquor is for use only for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his bona fide guests when entertained by him therein." 3 C. S., 3411(j).

In *S. v. Winston, ante,* p. 243, it is held that a person cannot purchase intoxicating liquor and then transport same to his private dwelling used and occupied by him as such for his personal consumption or his family or bona fide guests when entertained by him therein. He is both guilty of purchasing and transporting. The possession may, within the statute, be either actual or constructive. *S. v. Meyers,* 190 N. C., p. 239.

The assignment of error as to the officer giving his impression, from indications about the premises, that the barrels had been where they were found ever since the store had been built, cannot be sustained. *Comrs. v. George,* 182 N. C., p. 414; *Kepley v. Kirk,* 191 N. C., p. 690. In fact this was admitted by the defendant.

The assignment of error as to evidence by the officers that they had searched the defendant's premises at least a half dozen times previous to this successful search, and denial was made by defendant that "he had a drop of whiskey in his house," cannot be sustained.

"In *S. v. Tate,* 161 N. C., 286, it is held: 'But such flight or concealment of the accused, while it raised no presumption of law as to guilt, is competent evidence to be considered by the jury in connection with the other circumstances. 12 Cyc., 395; 21 Cyc., 941.'" *S. v. Adams,* 191 N. C., at p. 527.

The assignment of error in regard to the question asked the defendant if he had not told the officer that he had been an officer himself, cannot be sustained. It was immaterial and harmless. A State's witness testified the defendant admitted he was caught, and there was no use of denying it or telling a story about it.

The assignment of error in the refusal to arrest the judgment as the indictment did not charge an offense, cannot be sustained. It is contended by defendant "it is not unlawful to possess liquor, but it is unlawful to possess liquor at a place other than one's dwelling. Therefore, when the bill of indictment simply charges, as in this case, that the defendant did possess intoxicating liquor, the charge is incomplete." The indictment is under section 2, 3 C. S., 3411(b). The exception in section 10, C. S., 3411(j), need not be negatived in the indictment. *S. v. Hammond, supra; S. v. Moore,* 166 N. C., p. 284. In section 10 the possession is prima facie evidence that the person kept it for sale, etc. *S. v. Mull, supra.*

The assignment of error as follows cannot be sustained: "But if you find it (meaning liquor) was not in his dwelling, but that he had it in his possession in this garage or outbuilding, according to the contention of the State, which was some feet removed, then his possession there would be unlawful under the statute." The first part of the charge is omitted, as follows: "Gentlemen of the jury, it would be necessary for you to be satisfied beyond a reasonable doubt that this whiskey was not in the dwelling, and the court charges you if you find from this evidence it was in his dwelling, then the possession would not be necessarily unlawful." *S. v. Pierce, supra.*

Assignment of error as follows cannot be sustained: "The court charges you if you find this whiskey was not in the dwelling-house where the defendant lived and at his habitation, but was in an outbuilding as has been testified to, if you find from the evidence beyond a reasonable doubt that it was whiskey, then the court charges you it would be your duty to return a verdict of guilty on that count." The following is the balance of this part of the charge not excepted to: "But if you are not so satisfied, gentlemen of the jury, beyond a reasonable doubt on that count, it would be your duty to return a verdict of not guilty." The charge of the court must be construed as a whole and not disjunctively. The court below had charged the jury before that the burden was on the State to satisfy them beyond a reasonable doubt of the guilt of the defendant. The court also charged, though not requested (*S. v. Boswell, ante,* 261), that defendant was presumed to be innocent until the State proved he was guilty beyond a reasonable doubt.

The court charged the jury that they must find beyond a reasonable doubt that there was whiskey in the barrels and it was intoxicating liquor—that is, that it contained one-half of one per cent alcohol capable of producing intoxication. There was no error in this instruction. *S. v. Sigmon,* 190 N. C., at p. 690.

The court below defined reasonable doubt: "Now reasonable doubt in North Carolina is not a vain, imaginary doubt; it means a doubt based upon reason, so the jury would be satisfied to a moral certainty. It is not an imaginative doubt at all." This is approved in *S. v. Sigmon, supra.* The whole charge was full and clear, and the case was tried with fairness to the defendant. In fact, all the evidence for the State showed that the filling-station and little store was 100 yards from the defendant's residence and had no connection with the residence. All the witnesses for the State testified that whiskey was found in the barrels. Defendant himself admitted that he was "caught and there was no use denying it and telling a story about it." No evidence was introduced by defendant to contradict this admission.

The evidence in the case discloses a flagrant violation of law of which defendant has been convicted. Defendant, an owner of a filling station, concealed in the basement of the store connected with the station two barrels with whiskey in them. This intoxicating liquor which, if sold to his customers who bought gasoline for their automobiles, would no doubt have the effect of having drivers of automobiles on the public highways drinking and dangerous to the life and limb of men, women and children. When the foundation of the store was laid, with premeditation and deliberation, he put the barrels to hold whiskey in, which were ingeniously concealed and covered up. A concealed blind tiger, hard to catch. The officers searched his place time and time again before they caught him. The searching was brought about by evidence in possession of the officers.

On 27 May, 1908, the people of North Carolina voted "Against the manufacture and sale of intoxicating liquors" by a majority of 44,196 votes. This State, in upholding the Eighteenth Amendment to the Constitution of the United States (46 States ratified it, including this State, and 2 against), by an overwhelming majority passed what is known as the Turlington or Conformity Act, not only conforming to the National Act, but making the State Act more stringent. In this State there has been no negative nullification, but positive appropriate legislation to enforce the National Act.

The defendant has deliberately violated the law of his Nation and his State—a law of moral uplift and economic worth, proven to be a blessing and benediction to the human family. In law we can find

No error.

BERTIE BYERLY v. M. A. BYERLY.

(Filed 9 November, 1927.)

Divorce—Statutes—Abandonment—Appeal and Error—Judgments—Presumptions—Alimony—Counsel Fees.

Where in an action by the wife under C. S., 1667, and amendments thereto, she has duly moved the court for alimony *pendente lite* and an allowance for counsel fees, and the husband has answered and offered evidence to the effect that the plaintiff had abandoned him, and that he had not abandoned her, and the record on appeal does not disclose any findings of fact upon the question but only that the trial judge had refused the plaintiff's motion until the jury should determine the issue, the presumption is that the trial judge had held adversely to the plaintiff as to the fact.

APPEAL by plaintiff from *Shaw, J.,* at September Term, 1927, of DAVIDSON. Affirmed.

This is an action brought by plaintiff against defendant, her husband, under C. S., 1667. A motion was made *pendente lite,* upon notice duly served on defendant, that reasonable subsistence and counsel fees be allowed her and her attorneys until final determination of the action. After hearing the complaint, answer, reply and affidavits, the court below denied the motion until the facts are heard and determined at the trial. Plaintiff excepted, assigned error and appealed to the Supreme Court.

Phillips & Bowers and Walser & Walser for plaintiff.
Spruill & Olive for defendant.

PER CURIAM. C. S., 1667, in part, is as follows: "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, . . . and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper," etc. This section was amended by Public Laws 1921, ch. 123, as follows: "That section one thousand six hundred and sixty-seven (1667) of Consolidated Statutes of North Carolina be amended by inserting in line seven (7), between the words 'subsistence' and 'allotted' the words 'and counsel fees'; and by inserting in line twelve between the words 'subsistence' and 'and' the words 'counsel fees': *Provided,* this act shall not apply in any way to pending litigation."

Further amended by Public Laws 1923, ch. 52: "That section one thousand six hundred and sixty-seven of the Consolidated Statutes be amended by adding at the end of said section the following: '*Provided,* that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees.' "

The defendant denied that he had abandoned or separated himself from his wife, but on the contrary charged that she had abandoned and separated herself from him. There is no necessity to rehearse the evidence. It is an unfortunate domestic trouble and a repetition of the differences between the husband and wife is edifying to no one. The court below found no facts. The presumption is that he based the judgment on the fact that plaintiff abandoned and separated herself from the defendant, and defendant did not abandon and separate himself from plaintiff.

C. S., 1667, *supra,* and the amendments do not contemplate that a wife who wrongfully abandons and separates herself from her husband should be awarded subsistence and counsel fees. See *Allen v. Allen,* 180 N. C., 465; *Price v. Price,* 188 N. C., 640; *McManus v. McManus,* 191 N. C., 740. The judgment below is

Affirmed.

MARY KING v. S. E. SELLERS, EXECUTOR OF SAMUEL BLOSSOM.

(Filed 16 November, 1927.)

1. Wills—Legacies—Ademption—Intent.

Ademption, in law, denotes the destruction, revocation or cancellation of a legacy in accordance with the intent of the testator, and results either from express revocation, or is implied from acts done by the testator in his lifetime, evincing an intention to revoke or cancel the legacy.

2. Same—Parent and Child—Reinvestment.

A devise by the testator to his daughter of a specified legacy in a certain amount, payable to him and secured by mortgage on certain lands of the mortgagor, and the amount collected by the testator in his lifetime and diminished by his reinvestment to another with mortgage security on other lands, and outstanding at the time of the testator's death, does not alone evince the intent of the testator to adeem the legacy in its diminished amount, nothing else appearing, but the difference in money between the two investments commingled with the other funds of the testator by him in his lifetime, does show such intent to adeem to that extent.

CIVIL ACTION, before *Bond, J.,* at April Term, 1927, of NEW HANOVER.

The plaintiff, Mary King, is the daughter of Samuel Blossom. The defendant is the executor of the last will and testament of Samuel Blossom.

The plaintiff instituted this action to recover a specific legacy of $4,000 bequeathed in item six of the last will and testament of Samuel Blossom, said item being as follows: "Subject to the estate for life hereinbefore devised to my wife, and upon its termination, I give and devise to my daughter, Mary King, a mortgage of $4,000 executed by H. H. Hall, trustee, to Samuel Blossom and recorded in the office of the register of deeds of New Hanover County, in Book 81, pages 342 *et sequitur.*"

The facts as set out in the complaint, with respect to the mortgage, are as follows: On 23 January, 1914, H. H. Hall executed a mortgage to Samuel Blossom, the testator, to secure a note of $4,000. Approximately six years thereafter, to wit, on 21 April, 1920, Samuel Blossom executed his will containing item six above referred to. On 27 November, 1923, H. Stein purchased from Hall the real estate covered by said mortgage. John D. Bellamy, Jr., attorney for H. Stein, delivered to Herbert McClammy, attorney for Samuel Blossom, a check for $4,022.66, which represented the principal of the Hall mortgage and $22.66 interest. On the following day Herbert McClammy, attorney for the testator, Samuel Blossom, deposited said check in the Peoples Savings Bank and took therefor a certificate of deposit payable to the order of Herbert McClammy. Nine days thereafter, to wit, on 7 December, 1923, Geo. L. Peschau executed a mortgage to the testator, Samuel Blossom, to secure a note for $3,500, and thereupon on the same day Herbert McClammy, attorney for said Blossom, cashed the certificate of deposit, depositing the proceeds in his individual name in another bank and disbursing $3,500 of said fund under the direction of said Geo. L. Peschau, mortgagor. In other words, $3,500 of this original Hall money was loaned to Peschau upon a note secured by deed of trust upon real estate.

Samuel Blossom, the testator, died in August, 1926. The Peschau note and mortgage for $3,500 was outstanding at the time of his death.

Plaintiff claims the Peschau note and mortgage under the sixth item of the will of her father, Samuel Blossom. The defendant, executor of Samuel Blossom, demurred to the complaint upon the ground that the legacy of the Hall note and mortgage had been adeemed and passed to other parties under the residuary clause of the last will and testament of Samuel Blossom. The trial judge sustained the demurrer and the plaintiff appealed.

Woodus Kellum for plaintiff.
Herbert McClammy for defendant.

BROGDEN, J. What constitutes the ademption of a legacy under the law of this State?

The legacy in controversy was a specific legacy. Ademption, in law, denotes the destruction, revocation or cancellation of a legacy in accordance with the intention of the testator and results either from express revocation or is implied from acts done by the testator in his lifetime, evincing an intention to revoke or cancel the legacy. The question was considered in *Starbuck v. Starbuck,* 93 N. C., 183, and the conclusion of the Court thus stated: "Specific legacies are said to be adeemed, when in the lifetime of the testator, the particular thing bequeathed is lost, destroyed, or disposed of, or it is changed in substance or form, so that it does not remain at the time the will goes into effect in specie, to pass to the legatees. If the subject-matter of such legacies ceases to belong to the testator, or is so changed as that it cannot be identified as the same subject-matter, during his lifetime, then they are adeemed—gone and never become operative." Ademption may result, as a matter of law, when a testator bequeaths the legacy for a particular purpose and thereafter gives the legatee the identical sum of money for the identical purpose. If a testator stands in *loco parentis* to the legatee and subsequently makes payments to the legatee equal to or even less than the legacy, such payments are prima facie a complete satisfaction or satisfaction *pro tanto.* But if such relationship does not exist, the payments do not prima facie relate to the prior legacy. In a gift of a general legacy, without reference to any particular fund to satisfy it, the intention of the testator is the controlling factor of ademption. Parol evidence of such intention is competent.

A subsequent sale of property specifically devised or bequeathed, nothing else appearing, constitutes an ademption. *Snowden v. Banks,* 31 N. C., 373; *Nooe v. Vannoy,* 59 N. C., 185; *Grogan v. Ashe,* 156 N. C., 287; *Perry v. Perry,* 175 N. C., 141.

The test of ademption is such a change in the subject-matter of the legacy as to destroy its identity. In applying the test it is well to bear in mind the wise utterance of *Pearson, C. J.,* in *Nooe v. Vannoy,* 59 N. C., 185: "But it is unusual for a father to adeem, in this manner, legacies given to children and exclude them from his contemplated bounty, when there has been no change of circumstances; and for this reason the Court is slow to adopt the conclusion that it is an ademption and will seek, anxiously, for some mode of explanation."

In the *Vannoy case* the testator bequeathed "the proceeds of the sale of my town property in the town of Wilkesboro." Thereafter the testator sold the property to Nooe, and afterwards invested the proceeds and took as security the notes of other persons. The inventory of the estate disclosed the existence of these notes. The opinion of the Court proceeds: "In our case comprehensive words of description are used, and at the date of the deed to the plaintiff, Nooe, 'the proceeds of the sale' were in the hands of the testator as a security, for which he held note of the said Nooe, the testator at the time received the proceeds of sale in money, and if he afterwards invested it, and took as security the notes of other persons, it was not an ademption, because the corpus, or thing itself was not changed, and a second or third collection and reinvestment on other securities, would not change it."

The *Vannoy case* is cited with approval by the Court of Appeals of Kentucky in *Durham's Admr. v. Clay,* 134 S. W., 153. In discussing the principle the Court said: "As stated, where a legacy of personal property is changed, it does not operate as an ademption so long as it remains in specie, and the change is not radical." The West Virginia Court in *Cornwell v. Mt. Morris M. E. Church,* 80 S. E., 148, considered the question upon a state of facts disclosing that the testatrix set aside a fund of $1,000 described in the will as "coal money." Thereafter in her lifetime the money was invested in municipal bonds which were left in the bank, marked as the property of the testatrix. The Court said: "Thus the form of the fund was changed from a deposit in the bank to an investment in bonds, and, on this change of form, there is based a claim of ademption, or destruction of the legacy, but the authorities do not sustain this position. The fund had not ceased to exist, nor in any way been destroyed or lost at the date of the death of the testatrix. It remained in an altered form, and the legacy had not been satisfied by any advancement in her lifetime. That such a change does not work an ademption of the legacy is well settled by authority."

Applying these principles of law to the facts disclosed in the record, it appears that the identity of $3,500 of this fund has been preserved. The legacy was created in the proceeds of a note secured by a deed of trust upon real estate. It does not appear that the testator was instrumental in collecting this note, but when the note was paid the money was not commingled with the general estate of the testator, but, as we interpret the record, segregated as a special fund and $3,500 thereof reinvested in a note secured by a deed of trust on real estate, and therefore being the identical form of investment that existed at the time the legacy was created. Of course, the balance of the $4,000 fund, not reinvested, has apparently been merged in the general estate of the testator, losing its identity and thus adeemed or lost.

We are therefore of the opinion, and so hold, that upon the facts as presented, there has been no ademption of that part of the fund represented by the Peschau note, and the judgment of the court sustaining the demurrer is

Reversed.

D. C. WADDELL, JR., v. R. A. DOUGHTON, COMMISSIONER OF REVENUE.

(Filed 16 November, 1927.)

Taxation—Inheritance—State Bonds—Exemptions—Statutes.

An inheritance tax is that imposed upon the taking of property by descent and distribution, or by will, from the decedent, and is not a property tax, and its collection is not prohibited by the statutory provision exempting the owners of State bonds from taxation by "all State, county or municipal taxation and assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise," etc., and *held further*, the redrafting of section 6, chapter 4, Public Laws of 1923, by the act of 1927, ch. 80, Art. I, schedule A, clarifies and does not destroy the principle upon which this decision rests.

APPEAL by plaintiff from *Townsend, Special Judge,* at September Term, 1927, of WAKE. Affirmed.

Controversy without action, involving validity of assessment made by defendant of inheritance tax upon legacy, consisting exclusively of bonds of the State of North Carolina, bequeathed to plaintiff as residuary legatee in the last will and testament of a resident of this State.

From judgment upon case agreed, submitted to the court pursuant to C. S., 626, plaintiff appealed to the Supreme Court.

Merrimon, Adams & Adams for plaintiff.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Harwood for defendant.

CONNOR, J. Lula Johnston Waddell died on 1 December, 1924. Prior to and at the date of her death, she was a resident of the State of North Carolina. Thereafter her last will and testament was duly probated. Plaintiff, as residuary legatee named therein, became entitled to certain bonds of the State of North Carolina, which were owned by the testatrix at the date of her death. The market value of these bonds at said date was $117,607.66. Defendant assessed upon the legacy bequeathed to plaintiff in said will, consisting of said bonds, an inheritance tax in the sum of $5,681.42. This sum was paid by plaintiff, who was both executor and residuary legatee, named in said will, under protest. He now seeks to recover the amount so paid, upon his contention that the assessment of an inheritance tax upon a legacy, consisting exclusively of State bonds, which are exempt from all State, county or municipal taxation, is unlawful and in contravention of the statutes under which the bonds were issued.

All of the bonds included in the legacy in this case were issued under authority of statutes duly enacted by the General Assembly of North Carolina. Each of said statutes contains a provision, applicable to said bonds, in words as follows:

"The bonds and coupons shall be exempt from all State, county or municipal taxation and assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income."

Plaintiff contends that by virtue of said provision the legacy which was bequeathed to him, consisting of said bonds, was not subject to assessment for an inheritance tax under the provisions of section 6 of chapter 4, Public Laws 1923, which are, as pertinent to this case, in words as follows:

"From and after the passage of this act all real and personal property of whatever kind and nature, including stocks and bonds of foreign and domestic corporations, held within the State, which shall pass by will from any person who may die seized or possessed of the same, while a resident of this State, shall be and hereby is made subject to a tax for the benefit of the State, as follows, etc."

The sole ground upon which it is contended that the assessment of an inheritance tax upon the legacy of plaintiff, under the will of the testatrix, is unlawful, is that said legacy consists of bonds of the State, which are exempt, by express provisions of the statutes under which they were issued, from taxation. The said bonds in the hands of a holder are exempt from taxation. No tax, direct or indirect, special or general, for the purpose of general revenue or otherwise can be levied upon said bonds, or collected from the holder on account of said bonds. Neither the testatrix during her life, nor her legatee, after he acquired title to said bonds, by virtue of her will, was or can be required to pay any tax to the State or to a county or municipality of the State, on said bonds as personal property or otherwise. The inheritance tax, however, which plaintiff has been required to pay and which he has paid, is not a tax upon the bonds, as property owned by him, but upon his right to take and hold said bonds under the will. The bonds are exempt from taxation in the hands of a holder, but this exemption does not extend to the right of succession or to the right to have said bonds transferred to him.

This necessarily follows, we think, from the nature of an inheritance tax, as defined by this Court and as levied and collected under the statute. It is not a tax on property, but on the succession to or transfer of property, occasioned by death. It has been so held consistently in many decisions of this Court. *In re Davis,* 190 N. C., 358; *Bank v. Doughton,* 189 N. C., 50; *Trust Co. v. Doughton,* 187 N. C., 263; *Corporation Commission v. Dunn,* 174 N. C., 679; *In re Inheritance Tax,* 168 N. C., 356; *Norris v. Durfey,* 168 N. C., 321; *S. v. Bridgers,* 161 N. C., 247; *In re Morris Estate,* 138 N. C., 259. In all these cases the principle announced in *Pullen v. Comrs.,* 66 N. C., 363, has been approved. It is said in that case by *Rodman, J.:* "We do not regard the tax in question as a tax on property, but rather as a tax imposed on the succession—on the right of the legatee to take under the will or of a collateral distribution in the case of intestacy. . . . Neither can it be held a tax on property merely because the amount of the tax is measured by the value of the property." To the same effect are decisions of the Supreme Court of the United States (see *Magoun v. Bank,* 170 U. S., 283, 42 L. Ed., 1037), and of the other States (see *Washington County Hospital Association v. Estate of Edward W. Mealey,* .... Md., ..., 88 Atl., 136, reported with annotation in 48 L. R. A., N. S., 373).

The fact that the statute relative to the inheritance tax has been redrafted (see Schedule A, Article 1, chapter 80, Public Laws 1927) evidently for the purpose of clarification, to the end that the principle upon which said tax is levied may appear more clearly, does not, we think, sustain plaintiff's contention that the tax levied under section 6, chapter 4, Public Laws 1923, is a tax on property and not on the succession or transfer of property, resulting from death. The tax imposed by the act of 1923 is an inheritance tax, and is valid for that reason upon the principle stated in *Pullen v. Comrs., supra.*

There is no error. The judgment is

Affirmed.

ARVILLE MASTEN AND LILLIE MASTEN v. THE TEXAS CO., H. C. WEAVIL AND C. B. YOKELEY.

(Filed 16 November, 1927.)

Waters and Water Courses—Subterranean Waters—Pollution—Damages—Evidence—Nonsuit.

Where a tank to supply large quantities of gasoline has been put into the ground by the defendant on property adjacent to that of plaintiff, and its use thus caused the seepage of gasoline into the ground in such quantities as to destroy the use of plaintiff's well of water used at his dwelling for drinking purposes, by entering into the underground water channels which gave him his water supply, the defendant is answerable for the damages thus caused, and the evidence in this case is *held* sufficient to take the issue to the jury upon defendant's motion as of nonsuit.

APPEAL by Texas Company from *Lyon, J.,* at September Term, 1927, of FORSYTH. Affirmed.

The evidence: That prior to the installation of the pump by the defendant, The Texas Company, that the water in the well of the plaintiffs was all right. After the installation of the pump and the union joint, the well became contaminated with gasoline. The defendant, Yokeley, lessee, entered into a trade with the defendant, The Texas Company, whereby the said company was to install the electric pump, which it did, and the defendant, Yokeley, was to use its gasoline. The defendant, The Texas Company, had notice of the condition of the tank shortly after the well became contaminated. The pumps installed by the defendant, The Texas Company, was one hundred and thirty feet from the well. This was the only gasoline tank within half a mile or more of the plaintiffs' home. The general contour of the ground was sloping from the gasoline tank to the well. A strata of rock ran from the tank to the well. The vein of water running into the well came from the northwest, the direction of the well from the pump. The gasoline tank is on the lot of H. C. Weavil. Mr. Barney is manager of The Texas Company. The Texas Oil Company put in the gasoline tank, etc., and it has a capacity of 500 gallons. C. B. Yokeley runs the filling station.

Arville Masten, plaintiff, testified: "This is gasoline that came out of my well (referring to liquid in jar which witness had). I took this out this morning. Mr. Reid and Mr. Swaim were with me at the time. There was seven inches more gasoline in the well at the time. (Counsel hands jar of liquid to jury for examination.) That is gasoline in that jar. Before this tank was put in my water was all right, in good condition. I have had gasoline in it all the time for two years now. . . .

(Redirect) I have gotten sixty or sixty-five gallons of this gasoline out of my well altogether."

E. H. Kirkman, county sanitary officer, testified, in part: "I inspected Mr. Masten's well about that time. I found quite a heavy skim of gasoline on top of the water, possibly half an inch or an inch. I then drew the water off and sealed the well, and about a week later made another inspection, and found about half an inch or an inch of gasoline on top of the water. We cleaned the well again; I went down in the well and drew off the contents and measured the gasoline. I got about five gallons of gasoline. I then notified Mr. Yokeley I wanted to look into the condition of his tank. I then went to Mr. Barney for permission to go into his pumping system, his part of it. He granted me permission. I went there to make the inspection and Mr. Weavil refused permission to make it. I came back later and made the inspection. I excavated around that upright tank. Around that union joint I found some wet mud, wet with gasoline. I found a drip from that union, and found the ground immediately underneath that drip saturated with gasoline. The well was walled with tile. It was concreted at the top and a pump was used."

Fred Swaim testified: "I helped dig this well of Mr. Masten's. The vein there comes from the northwest, kind of the direction of where the filling station is."

The defendant denied any negligence in the installation of the tank, or any negligence in permitting the tank to remain in a leaking condition, and denied that the gasoline in the well came from, or had any connection with, the gasoline in the tank.

Judgment of nonsuit was entered against Yokeley. The Texas Company is the only defendant that appealed.

Wallace & Wells and W. H. Beckerdite for plaintiff.
Swink, Clement & Hutchins for defendant.

CLARKSON, J. This action was tried in the Forsyth County Court. After the plaintiffs had introduced their evidence, motion was made by defendant for judgment as in case of nonsuit, C. S., 567, which was allowed. Plaintiffs excepted, assigned error and appealed to the Superior Court. The judgment of the Forsyth County Court was reversed and the action remanded to said court for trial on the facts. Defendant, Texas Company, excepted, assigned error and appealed to the Supreme Court. We think the evidence, though circumstantial, more than a scintilla, and sufficient to be submitted to a jury. *Ledford v. Power Co., ante,* p. 98. The probative force is for a jury to determine.

The principle upon which the action is bottomed is well stated in 27 R. C. L., part of section 137, p. 1223, as follows: "The weight of modern authority supports the rule that a person who, by permitting the pollution of his own soil or the water thereunder, contaminates his neighbor's well or the streams under the neighbor's land, from which water is appropriated, is liable to the latter in damages, and in some cases the continuance of such pollution has been restrained by injunction." *Clark v. Lawrence,* 59 N. C., p. 83; *Rouse v. Kinston,* 188 N. C., p. 1; *Finger v. Spinning Co.,* 190 N. C., p. 74; *Cook v. Mebane,* 191 N. C., p. 1.

One may no more pollute a subterranean stream than a surface stream. A person has no right to befoul, corrupt or poison underground water so that when it reaches his neighbor's land it will be unfit for use by either man or beast. The same principle applies to noxious odors. This is good morals as well as good law. The judgment of the Superior Court is

Affirmed.

LLOYD WRIGHT AND CORINNA WRIGHT v. C. L. HEPLER, ADMINISTRATOR OF JAMES HUGHES ET AL.

(Filed 16 November, 1927.)

Infants—Contracts—Deeds and Conveyances—Disabilities—Disaffirmance of Contracts—Benefits Retained.

After becoming of age, one will not be permitted to repudiate his contract made when a minor and retain its benefits, and when he has acquired title to lands under a deed and reconveys the lands to the seller by mortgage to secure the balance of the purchase price, both of which conveyances are duly registered, and thereafter places another mortgage thereon which is still outstanding, he is not in position to reconvey the land which he still holds to his purchaser or his heirs at law and disaffirm his deed made when a minor, and demand the repayment of that part of the purchase money he then had theretofore paid.

APPEAL by defendants from *Sink, Special Judge,* at May Term, 1927, of DAVIDSON. Error.

Spruill & Olive for plaintiffs.

P. V. Critcher, Phillips & Bower and Walser & Walser for defendants.

ADAMS, J. On 1 October, 1924, James Hughes and his wife executed and delivered to the plaintiff, Lloyd Wright, a deed in fee simple for a tract of land in Emmons Township, Davidson County, containing about forty-seven acres. At the same time Lloyd Wright and his wife executed a mortgage to James Hughes to secure a part of the purchase price. The deed and mortgage were duly recorded. When these instruments were executed Lloyd Wright and his wife were minors. He became twenty-one on 12 March, 1925, she on 27 February, 1925; and on 3 July, 1925, they executed a mortgage on the land in question to A. F. Wright and J. D. Wright, respectively, the father and the uncle of the purchaser, to secure the sum of five hundred dollars. Thereafter on 12 February, 1926, Lloyd Wright and his wife signed a deed in fee purporting to convey to the heirs at law of James Hughes the land purchased from him and delivered it to the clerk of the Superior Court, instructing him to turn it over to the grantees upon repayment by them of $435, which had been paid as a part of the purchase price. The plaintiffs brought suit to annul the contract between James Hughes and themselves on the ground that by executing a mortgage to A. F. Wright and J. D. Wright they disaffirmed the deed the male plaintiff had received from his grantor and the mortgage they had executed to him. Analyzed, their contention amounts to this: Lloyd Wright is entitled to recover the purchase money he has paid upon reconveying the title, but the reconveyed title may be defeated by a sale under the mortgage to A. F. Wright and J. D. Wright. The result would be that the heirs of James Hughes would be deprived both of the purchase money and of the land itself. This the law will not permit. In *Millsaps v. Estes*, 137 N. C., 536, 546, it is said: "Neither an infant nor a married woman will be permitted to repudiate a transaction upon the ground of a want of capacity, or for other sufficient cause, and at the same time retain and enjoy any benefit derived from it." The principle supported by an array of authorities is thus stated in 31 C. J., 1021, sec. 71(4): "If an infant, upon his arrival at majority, still has the property or consideration received by him, or any part thereof, he must, upon the avoidance of his act, restore such property or consideration."

The mortgage to A. F. Wright and J. D. Wright was executed on 3 July, 1925, after each of the plaintiffs had arrived at the age of twenty-one years, and the deed purporting to reconvey the land to the heirs of James Hughes was executed 12 February, 1926. The plaintiffs therefore are not in a position to restore the unencumbered legal title. The mortgagees have not consented and are not parties to the action. Moreover, the execution of the mortgage by the male plaintiff to his father and his uncle was an express declaration that he claimed and asserted title to the land. Indeed, he covenanted that he was the owner of the land and had the right to convey the title by mortgage. This mortgage, instead of being in disaffirmance of the contract, was an act of ratification. True, the second conveyance of land by a person who has attained his majority may operate as an avoidance of a former conveyance made by the grantor when under age, as pointed out in *Ward v. Anderson,* 111 N. C., 115, and *Gaskins v. Allen,* 137 N. C., 426. But this principle for the reasons already given, is not applicable to the case before us.

The motion for nonsuit should have been granted.

Error.

RING & WELLBORN v. WHITMAN.

(Filed 16 November, 1927.)

1. **Constitutional Law—Federal Constitution — Judgments — Faith and Credit—Fraud.**

The provisions of the Federal Constitution requiring that a State shall give full faith and credit to the judicial proceedings of every other State, Article IV, sec. 1, does not preclude the inquiry as to whether the judgment in question is impeachable for fraud in certain instances.

2. **Same—Trials—Estoppel.**

Where a judgment of another State is sued on in this State, the courts will not inquire into matters of fraud or other defense which were within the scope of the inquiry of the action in which the judgment had been rendered.

3. **Same—Questions of Law—Trials.**

An allegation that plaintiff procured the judgment in another State sued on here, in a form and manner to obtain a judgment by default when there were no facts to warrant the action, is tantamount to saying that the judgment was erroneous in law, within the purview of the action brought therein.

4. **Process—Service—Lunacy—Judgments — Constitutional Law — Faith and Credit.**

Where judgment by default for want of an answer has been rendered in another State, it is insufficient to set it aside here for lack of service of summons, that the defendant had been confined in an asylum under an inquisition of lunacy, when it is further made to appear that he had been discharged and was in his right mind when the summons in the action was served upon him, and had employed an attorney to defend the suit, who did not file the answer, in consequence of which the default judgment had been entered.

APPEAL by defendant from *Clayton Moore, Special Judge,* at June Term, 1927, of FORSYTH.

In a Circuit Court held for Grayson County, Virginia, in 1925, the plaintiffs recovered a judgment against the defendant for $842.42 with interest thereon at 6 per cent from 27 July, 1922, and on 10 March, 1927, they brought suit against the defendant on this judgment in the Forsyth County Court. No answer was filed, and on 25 April, 1927, the clerk gave judgment by default final. On 21 May, 1927, the judge of the county court set aside the clerk's judgment on the ground of excusable neglect. The plaintiffs excepted and appealed to the Superior Court and the judgment of the county court was reversed. The defendant excepted and appealed for alleged errors referred to in the opinion.

William H. Boyer and F. L. Webster for plaintiffs.
Benbow, Hall & Benbow and E. M. Whitman for defendant.

ADAMS, J. The Federal Constitution provides that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. Const., Art. IV, sec. 1. But this provision does not prevent an inquiry whether the judgment sued on is impeachable for fraud. *Cole v. Cunningham,* 133 U. S., 112, 33 Law Ed., 538; *Mottu v. Davis,* 151 N. C., 237. The appellant alleges that the action in the Virginia Court was fraudulent because it was brought "in a form and manner to obtain judgment by default against defendant although there were no facts to warrant any such action." This is tantamount to an allegation that the judgment rendered in Virginia was erroneous in law; but it was held in *Fauntelroy v. Lum,* 210 U. S., 230, 52 Law Ed., 1039, that a judgment cannot be impeached by showing that it was based on an error of law. And in *Williamson v. Jerome,* 169 N. C., 215, it is said: "The courts of this State will not vacate or enjoin a judgment merely based upon a cause of action, which may be vitiated by fraud, for this is a valid defense which may be interposed at the trial; and unless its interposition is prevented by the fraud of the adversary, it cannot be asserted against a judgment either foreign or domestic. Black on Judgments, sec. 919, and cases there cited." The defendant had been personally served with summons and was given every opportunity to present to the Circuit Court of Grayson County the defense he now seeks to interpose.

This principle applies also to his contention that he has a valid counterclaim to the cause of action and that no copy of the account was served on him as required by section 6132 of the Code of Virginia. It may be said in addition that as we understand the declaration the action was laid in assumpsit to which the succeeding section would apply.

The appellant further relies on an inquisition of lunacy under which he was committed to the hospital in Morganton. The record shows that the inquisition was made in June, 1923, and that the defendant was discharged on 8 August, 1924. He was personally served with summons in the present action on 10 March, 1927, and employed an attorney; but the attorney filed no answer because in his opinion the appellant did not have "a leg to stand on." Judgment

Affirmed.

W. A. SEAWELL v. CHAS. COLE & CO., INC., AND S. F. COLE.

(Filed 16 November, 1927.)

1. Pleadings—Demurrer Ore Tenus—Statutes.

A demurrer to the complaint *ore tenus* must distinctly specify the grounds of objection or it may be disregarded.

2. Same—Appeal and Error—Courts—Ex Mero Motu.

The Supreme Court may, *ex mero motu*, look into the record to ascertain if the complaint sufficiently alleges a cause of action.

3. Same—Pleadings Liberally Interpreted.

Upon the inquiry as to whether the complaint states a cause of action, it will be liberally construed with every reasonable intendment therefrom in the plaintiff's favor, however uncertain, defective and redundant its allegations may be drawn.

APPEAL by plaintiff from *Stack, J.*, at February Term, 1927, of MOORE. Reversed.

H. F. Seawell & Son for plaintiff.

CLARKSON, J. Another branch of this matter was before this Court. See *Johnson, Admr., v. Leavitt,* 188 N. C., p. 682.

The record discloses that the defendants' counsel "thereupon demurred *ore tenus* for that the complaint does not state a cause of action. The court thereupon dictated to the clerk its order and judgment sustaining the demurrer and dismissing the action, to which the plaintiff excepted and appealed to the Supreme Court." No counsel appeared in this Court for the defendant, and the demurrer was not renewed in this Court. C. S., 512, is as follows: "The demurrer must distinctly specify the grounds of objection to the complaint, or it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein."

In *Elam v. Barnes,* 110 N. C., p. 73, the facts were similar, it is said, at p. 74: "It is but fair, however, to the opposite side that the court below should require, as the statute demands, that the demurrer, even when made *ore tenus,* should point out the alleged defect, since it gives opportunity to ask for an amendment if the defect admits of cure, or permits further costs to be avoided if the defect is incurable, since the party, upon the particulars being indicated, may become satisfied of the invalidity of his cause of action and discontinue further proceedings. This would seem to be the reason of the statute, at any rate its provisions are clear and should be observed."

In the *Elam case, supra,* this Court looked into the record and dismissed the action. In the present action, we will reiterate well settled law in this jurisdiction: "But when a case is presented on demurrer, we are required by the statute, C. S., 535, to construe the complaint liberally, 'with a view to substantial justice between the parties,' and in enforcing this provision we have adopted the rule 'that if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn or however uncertain, defective and redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader.'" *S. v. Bank,* 193 N. C., 527, and cases cited. *Foy v. Stephens,* 168 N. C., p. 438; *S. v. Trust Co.,* 192 N. C., 246.

It is said in *S. v. McCanless,* 193 N. C., at p. 206, "If any of the causes of action are good, the demurrer cannot be sustained."

In *Snipes v. Monds,* 190 N. C., at p. 191, it is said: "Even after answering in the trial court, or in this Court, a defendant may demur *ore tenus,* or the Court may raise the question *ex mero motu* that the complaint does not state a cause of action." The judgment is

Reversed.

J. F. ALLRED ET UX. v. TREXLER LUMBER COMPANY ET AL.

(Filed 16 November, 1927.)

1. **Removal of Causes — Federal Courts — Parties — Nominal Parties— Courts—Jurisdiction.**

Where a nonresident defendant seeks to remove a cause from the State to the Federal Court for diversity of citizenship, the plaintiff's joinder of purely nominal party will not oust the jurisdiction of the Federal Court, and alone is insufficient to defeat the defendant's motion to remove the case under the Federal statute.

2. Same—Trusts—Trustees—Actions—Contracts—Damages.

Where resident plaintiffs bring an action for damages *ex contractu,* and likewise seek to enjoin the sale of lands under a power given by a deed of trust, the joinder of the trustee is of a mere nominal party, and will not prevent the defendant's motion to remove the cause to the Federal Court for diversity of citizenship.

APPEAL by plaintiffs from *Lyon, Special Judge,* at May Term, 1927, of MOORE.

Motion to remove cause to the District Court of the United States for the Middle District of North Carolina for trial. Motion allowed, and plaintiffs appeal.

U. I. Spence for plaintiffs.

Fuller, Reade & Fuller for defendant, Trexler Lumber Company.

STACY, C. J. The plaintiffs, residents of Moore County, North Carolina, sue the Trexler Lumber Company, a corporation, citizen and resident of the State of Pennsylvania, for damages arising *ex contractu,* and at the same time seek to enjoin the foreclosure of a deed of trust given to secure the payment of certain promissory notes executed by plaintiffs to the corporate defendant.

Victor S. Bryant, a resident of Durham, N. C., was named as trustee in the deed of trust, the foreclosure of which is sought to be enjoined, and his executrix, upon whom "all the title, rights, powers and duties of such trustee" were cast (C. S., 2578) at his death, is joined purely as a nominal defendant, and no separate cause of action is alleged or relief demanded as against her. Her interest, therefore, is not sufficient to defeat a removal of the cause of action to the Federal Court for trial. *Morganton v. Hutton,* 187 N. C., 736, 122 S. E., 842.

Where it appears that the real controversy is between citizens of different States, the presence of mere formal parties, such as executors of a deceased trustee, even though citizens of the same State with the plaintiff, will not defeat or oust the jurisdiction of the Federal Court. *Walden v. Skinner,* 101 U. S., 577; Black's Dillon on Removal of Causes, chapter 8, sec. 85.

This was the holding of the trial court, and we find no error in the ruling.

Affirmed.

BROGDEN, J., took no part in the consideration or decision of this case.

J. I. WOODY v. FIRST NATIONAL BANK OF ROCKY MOUNT, N. C.

(Filed 16 November, 1927.)

1. Banks and Banking—Action—Election of Remedies—Duty.

Although the relation of debtor and creditor exists between a bank and a depositor, yet a bank is a *quasi*-public corporation and is under duty to pay the checks of a depositor when the depositor has sufficient funds in the bank, and failure to do so gives rise to an action in tort or one on contract, at the election of the plaintiff.

2. Same—Tort—Damages.

A bank is under obligation to its depositor to pay his checks on presentation when his deposit in the bank is sufficient, and unless protected by a provision of a statute, is liable in tort for its failure to do so for nominal damages at least, and in proper instances for substantial damages naturally flowing therefrom when not too speculative or remote.

3. Damages—Bills and Notes—Measure of Damages.

Although formerly held in England that when plaintiff is a merchant or trader the jury may award substantial damages in proper instances, but when otherwise the jury may award nominal damages or such actual damages as are proven, the reason for the distinction is obsolete; and any person will be deemed substantially damaged upon the refusal of a bank to pay his check, unless protected by the provisions of 3 C. S., 220(m), and substantial damages may be awarded. The analogy to libel and slander pointed out. And where the nonpayment is through malice, punitive damages may also be recovered.

4. Banks and Banking—Action—Statutes—Question for Jury.

3 C. S., 220(m) providing that actual damages only shall be awarded against a bank for the nonpayment of a check covered by sufficient funds, applies, by the language of the statute, only where the nonpayment is not through mistake or error, and without malice, and where the complaint alleges that the nonpayment was wrongful and malicious the statute does not apply, unless the jury find the issue against the plaintiff.

5. Action—Cause of Action—Demurrer—Error—Questions for Jury.

Where the complaint alleges that a bank wrongfully and maliciously fails to pay a check drawn on it by a depositor and covered by sufficient funds, the question of malice is for the jury, and the sustaining of a demurrer to the complaint is reversible error.

6. Bills and Notes—Statutes.

A check is a bill of exchange drawn on a bank, payable on demand, C. S., 3167; further defined as a written order on a bank or banker, purporting to be drawn against a deposit of funds, for the payment at all events of a sum of money to a certain person therein named, or to him or his order, or to bearer, and payable on demand.

APPEAL by plaintiff from *Nunn, J.*, at April Term, 1927, of EDGECOMBE. Reversed.

Action to recover damages for the wrongful nonpayment of a check drawn by plaintiff, a depositor of defendant bank. It is alleged that said nonpayment was not only wrongful, but also wilful, wanton and malicious. Defendant demurred to the complaint for that the facts stated therein do not constitute a cause of action.

From judgment sustaining the demurrer, and dismissing the action, plaintiff appealed to the Supreme Court.

George M. Fountain for plaintiff.
Battle & Winslow for defendant.

CONNOR, J. The material facts alleged in the complaint, upon which plaintiff demands judgment in this action against defendant, are as follows:

1. On 28 April, 1926, plaintiff, a resident of the city of Rocky Mount, N. C., drew his check upon defendant bank for the sum of six dollars, said check being payable to the order of E. L. Hollingsworth. It was delivered by plaintiff to said Hollingsworth, in part payment for a suit of clothes.

2. A few days after its delivery to him by plaintiff, the said Hollingsworth, having first endorsed the check, delivered same to the Kinston Garage, Inc., at Kinston, N. C., in payment for automobile supplies purchased by him from said garage. The said Kinston Garage, Inc., as endorsee, promptly deposited said check in a bank at Kinston, N. C., for collection and deposit to its account in said bank. In due course of business the Kinston bank caused said check to be duly presented to defendant bank at Rocky Mount, N. C., for payment.

3. At the time said check for six dollars was drawn by plaintiff, and also at the time same was presented to defendant for payment, plaintiff had on deposit with defendant, subject to his check, a sum of money in excess of fifty dollars. Plaintiff had kept a checking account with defendant for many years. Defendant refused to pay said check when same was presented; it caused said check to be returned to the Kinston Garage, Inc., the holder, with notation thereon as follows: "No Account."

4. After said check with said notation had been returned to it, the Kinston Garage, Inc., caused a criminal warrant to be issued from the recorder's court of Kinston, N. C., for the arrest of plaintiff, upon the charge that he had given a worthless check with intent to cheat and defraud. Pursuant to said warrant, plaintiff was arrested in the city of Rocky Mount and required to give bond for his appearance in the recorder's court at Kinston to answer the charge upon which the warrant for his arrest had been issued. Upon his appearance in said court,

plaintiff showed by the assistant cashier of defendant bank, and by its ledger sheets, that he had funds on deposit with defendant, both at the time the check was drawn and at the time it was presented for payment, more than sufficient in amount for the payment of the check. Upon this showing, with the consent of the prosecuting attorney, a verdict of "Not Guilty" was entered, and plaintiff was discharged.

5. The refusal of defendant to pay plaintiff's check for six dollars, when same was presented, was wilful, negligent, wanton and malicious, and in utter disregard of the duty which defendant owed to plaintiff, as a depositor, with respect to said check. Prior to such refusal, plaintiff had enjoyed a wholesome reputation in the city of Rocky Mount, where he had long resided, and where he was employed by the Atlantic Coast Line Railroad Company.

6. As a result of his arrest and confinement in jail, pending the giving of his bond, and of his enforced attendance upon the recorder's court in Kinston, pursuant to said bond, plaintiff was humiliated and degraded, and his reputation and standing in the city of Rocky Mount impaired, to his great damage in the sum of $5,000. The injury which he thereby sustained was proximately caused by the wrongful and malicious act of defendant in refusing to pay his check, and resulted in special damage to plaintiff.

Upon the foregoing facts, alleged in the complaint, and for the purposes of this action admitted by the demurrer, plaintiff prays judgment that he recover of defendant (1) compensatory damages in the sum of $5,000; (2) punitive damages in the sum of $5,000; (3) the costs of the action; and (4) such other and further relief as he may be entitled to in the premises.

Defendant demurred to the complaint, for that same does not state facts sufficient to constitute a cause of action. C. S., 511, subsection 6. The court sustained the demurrer, and rendered judgment dismissing the action. Plaintiff excepted to the judgment, and upon his appeal to this Court assigns same as error. The sole question, therefore, presented for decision by this Court is whether upon the facts alleged in the complaint, plaintiff is entitled to recover of defendant in this action. The decision of this question requires, first, a consideration of the law generally, with respect to an action by a depositor against his bank to recover damages for the wrongful nonpayment of his check; and, second, an examination of the statute in this State relative to such action, in order to determine its effect, if any, upon plaintiff's right to recover in this action.

It has been generally held that the relation of a depositor to his bank is ordinarily, if not universally, that of a creditor and debtor. This relation arises out of the contract, express or implied, that the bank will, from time to time, pay to the depositor or to his order, upon his demand, amounts not exceeding his deposit or balance. These demands are usually made by checks, signed by the depositor, payable to the order of the payee, and duly presented to the bank for payment by the payee, endorsee, or holder. A check is defined by statute as a bill of exchange drawn on a bank, payable on demand. C. S., 3167. In *Trust Co. v. Bank,* 166 N. C., 112, this Court has said: "A check is a bill of exchange, and may more particularly be defined as a written order on a bank or banker, purporting to be drawn against a deposit of funds, for the payment, at all events, of a sum of money to a certain person therein named, or to him or to his order, or to bearer, and payable on demand. Norton on Bills and Notes, 400." Upon the refusal or failure of the bank to pay the check of its depositor, the bank is liable for a breach of its contract. This liability the depositor may enforce against the bank by an action against the bank in a court of competent jurisdiction. In such action the depositor may recover of the bank the amount of his check, with interest and cost; the action being on contract, the recovery is limited to the amount of the check, with interest from date of demand and refusal, and, by virtue of the statute, the costs of the action.

Except possibly in rare cases, a debtor is not liable to his creditor for damages in an action in tort, upon his failure or refusal to pay the debt. His liability arises upon contract, and is limited to the amount of his debt. However, it has been generally held that notwithstanding the relation of the bank to its depositor is that of debtor and creditor, a bank may be held liable in tort to its depositor whose check it has wrongfully refused or failed to pay. In *Marzetti v. Williams,* decided by the Court of King's Bench in 1830, and reported in 1 B. & D., 415, 109 Eng. Rep., 842 (full reprint), it was held that a banker is bound by law to pay a check drawn by a customer, within a reasonable time after the banker has received from the customer funds sufficient in amount for such payment; and that the latter may maintain an action in tort against the banker, who has wrongfully refused or failed to pay his check, although he has sustained no actual damages. In that case, *Taunton, J.,* said: "The defendants were guilty of a breach of duty, which duty the plaintiff at the time had a right to have performed. The jury have found that when the check was presented for payment, a reasonable time had elapsed to have enabled defendants to enter the forty pounds to the credit of plaintiff, and therefore they must or ought to have known that they had funds belonging to him. That was sufficient to entitle plaintiff to recover nominal damages, for he had a right to have his check paid at the time it was presented, and defendants were guilty of a wrong by refusing to pay it. The form of the declaration, whether it be in tort or in assumpsit, makes no substantial difference, nor can it be any real ground of distinction whether the foundation of the action be an express or implied assumpsit. There are many instances where a wrong, by which the right of a party may be injured, is a good cause of action, although no actual damage be sustained."

In *Rolin v. Steward,* decided in the Court of Common Pleas and Exchequer Chamber, in 1854, and reported in 14 C. B., 594, 139 Eng. Rep., 245 (full reprint), it was held that substantial damages may be recovered of a banker for dishonoring the checks of his customer, there being sufficient funds in his hands at the time to meet them. At the trial, the jury were instructed that they ought not to limit their verdict to nominal damages, but should give the plaintiff such temperate damages as they should find to be reasonable compensation for the injury which plaintiff must have sustained by the wrong of the defendant. *Creswell, J.,* upon the appeal, said: "I am of opinion that as far as the application in this case depends upon the ground of misdirection, the rule must be discharged. It appears to me that the direction of my *Lord Campbell* was perfectly right. He told the jury that they ought to give, not nominal, nor excessive damages, but reasonable and temperate damages. I think the case of *Marzetti v. Williams* goes the full length of justifying that direction." *Williams, J.,* said: "I think it cannot be denied that if one who is not a trader were to bring an action against a banker for dishonoring a check at a time when he had funds of the customer in his hands sufficient to meet it, and special damages were alleged and proved, the plaintiff would be entitled to recover substantial damages, when it is alleged and proved that the plaintiff is a trader. I think it equally clear that the jury in estimating the damages may take into consideration the natural and necessary consequences which must result to the plaintiff from defendant's breach of contract; just as in the case of an action for slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damages."

The law in England, with respect to this action, has been stated in the opinions delivered in *Marzetti v. Williams* and *Rolin v. Steward.* The decisions in both these cases have been subsequently approved and followed. The law as therein stated is that a depositor whose check has been wrongfully dishonored by the refusal or failure of the bank on which it was drawn to pay the same, may maintain an action against the bank, not only in contract, but also in tort, to recover the damages which he has sustained, and that the jury may, when the plaintiff is a merchant or trader, assess not only nominal, but also substantial damages; when the plaintiff is not a merchant or trader, he may recover such sum as special damages as the jury shall find, upon the facts, will compensate him for the injury resulting from the wrong done him by the defendant. In either case plaintiff is entitled to recover nominal damages, at least, which the law presumes from the wrongful act of defendant.

The decisions in *Marzetti v. Williams* and in *Rolin v. Steward* have been generally followed in the courts of the United States and of the several states. See 34 A. L. R., 202, 13 A. L. R., 302, 4 A. L. R., 940, 58 L. R. A., 956. In some of these courts the distinction between a trader or merchant and one who is neither, is not recognized as affecting the right of a depositor to maintain the action against his bank. In view of the almost universal custom now obtaining with respect to the banking business, this distinction does not seem to us to be well founded. A plaintiff's right to maintain this action, under present conditions, ought not to be dependent upon or determined by his business or occupation; the conditions upon which the distinction was founded no longer prevail. Men not engaged in business as merchants or traders are now quite generally bank depositors, and as such avail themselves of banks as a means of conducting financial transactions, to the profit not only of themselves, but also of the banks with which they do business. The law in the United States, as now generally applied by the courts, is stated in Morse on Banks and Banking, 5 ed., 1917, Vol. II, sec. 458, as follows:

"We have already stated that a bank is under obligation to pay the checks, drafts and orders of a depositor so long as it has in its possession funds of his sufficient to do so, and which are not encumbered by the attaching of an earlier lien in favor of the bank. The duty of the bank to make such payments, and the reciprocal right of the depositor to have them made, arises from the contract to that effect, which though probably never definitely expressed, will always be considered to be implied from the usual course of the banking business. This duty and this right are so far substantial, that if the bank refuse, without sufficient justification, to pay the check of the customer, the customer has his action for damages against the bank. It has been said that if in such action the customer does not show that he has suffered a tangible or measurable loss or injury from the refusal, he shall recover only nominal damages. In New York it is held that a depositor may sue in contract or in tort, for wrongful refusal to pay his check, and if he sues in contract and the failure of the bank is not charged as wilful and no special damages are shown, and the check is finally paid, the plaintiff can only recover nominal damages. But the better authority seems to be that, even if such actual loss or injury is not shown, yet more than nominal damages shall be given. It can hardly be possible that a customer's check can be wrongfully refused payment without some impeachment of his credit, which must in fact be an actual injury, though he cannot from the nature of the case furnish independent, distinct proof thereof. It is as in cases of libel and slander, which description of suit, indeed, it closely resembles, inasmuch as it is a practical slur upon the plaintiff's credit and repute in the business world. Special damages may be shown, if the plaintiff is able; but if he be not able, the jury may, nevertheless, give such temperate damages as they conceive to be a reasonable compensation for that indefinite mischief which such an act must be assumed to have inflicted, according to the ordinary course of human events. Exemplary damages may be given when the failure to pay is malicious, or the result of gross indifference; but they shall not be given, unless the bank was guilty of fraud, malice, gross negligence or oppression."

This statement of the law is fully supported by the decisions in cases cited in the notes. The principle upon which the law, as thus declared, rests, is stated in *Patterson v. Marine National Bank,* 130 Pa., 419, 18 Atl., 632, as follows: "A bank is an institution of a *quasi*-public character. It is chartered by the government for the purpose, *inter alia,* of holding and safely keeping the moneys of individuals and corporations. It receives such moneys upon an implied contract to pay the depositor's check upon demand. Individual and corporate business could hardly exist for a day without banking facilities. At the same time, the business of the community would be at the mercy of the banks if they could at their pleasure refuse to honor their depositors' checks and then claim that such action was the mere breach of an ordinary contract, for which only nominal damages could be recovered unless special damages were proved. There is something more than a breach of contract in such cases; there is a question of public policy involved, as was said in *First National Bank v. Mason,* 95 Pa., 113, 40 Am. Rep., 632; and a breach of the implied contract between the bank and its depositor entitles the latter to recover substantial damages." This statement of the principle upon which the law rests is quoted with approval by the Court of Appeals of Kentucky in *American National Bank v. Morey,* reported in 58 L. R. A., 956. It has been expressly held that mere mistake or inadvertent error on the part of the bank is no defense to plaintiff's recovery, nor will the bank be heard to say in its defense that its nonpayment of a check, where the drawer had funds on deposit sufficient for its payment, was without malice, when the plaintiff seeks to recover substantial or actual damages, only.

So much for the law as generally declared and applied by the courts of England and of the United States. While this seems to be the first case presented to this Court for its consideration, involving this law or the principles upon which it rests, it is sustained by such overwhelming weight of authority and is supported in principle by such satisfactory reasons, that we declare it to be the law in this State, to be applied, in the absence of a controlling statute to the contrary, in an action by a depositor against his bank to recover damages for the wrongful nonpayment of his check. Defendant contends that our statute—3 C. S., 220(m)—modifies the law, as generally declared, with the result that plaintiff's cause of action, as stated in his complaint, cannot now be maintained.

This statute was enacted by the General Assembly in 1921, and is section 28 of chapter 4, Public Laws 1921, entitled "An Act to Regulate Banking in the State of North Carolina, and for other purposes." As included in 3 C. S., 1924, it is as follows:

"Sec. 220(m). *Nonpayment of check in error, liability for.* No bank shall be liable to a depositor because of the nonpayment, through mistake or error, and without malice, of a check which should have been paid had the mistake or error of nonpayment not occurred, except for the actual damage by reason of such nonpayment that the depositor shall prove, and in such event the liability shall not exceed the amount of damage so proven."

Upon the facts alleged in the complaint and admitted by the demurrer, this statute is not applicable in the instant case. It does not appear that the nonpayment of plaintiff's check was through mistake or error, on the part of defendant or of one of its employees. It is expressly alleged that the act of defendant, in refusing or failing to pay the check, which should have been paid, was not only wrongful, but also malicious. Upon the facts admitted for the purpose of our present decision, plaintiff is entitled to nominal damages at least. Liability for nominal damages, presumed from the wrongful act of defendant, is sufficient to constitute a cause of action. We must, therefore, hold that there was error in sustaining the demurrer and in dismissing the action. For this error the judgment must be reversed and the action remanded to the end that defendant may have leave to file an answer to the complaint, if so advised.

It is not necessary at this time to decide or to discuss the extent of defendant's liability for damages upon the facts alleged in the complaint. Whether defendant, whose wrongful act was its refusal to pay plaintiff's check, can be held liable for damages sustained by him because of his arrest upon a warrant, procured by the Kinston Garage, Inc., charging that he gave a worthless check with intent to cheat and defraud, must be ultimately determined when all the facts have been found, showing whether or not such damages are recoverable of defendant as special damages naturally flowing from defendant's wrong to plaintiff, which defendant should have foreseen would probably occur. Whether or not defendant is liable for punitive damages must be determined by the jury, to whose sound judgment this question is addressed, provided they shall first find that defendant's act was not only wrongful, but also wilful, malicious, wanton and oppressive.

The statute relieves a bank which has wrongfully refused or failed to pay its depositor's check, from liability in damages therefor, only in the event it shall appear upon the face of the complaint, or shall be found by the jury, in answer to issues properly raised by the pleadings, that the wrongful nonpayment was through mistake or error, and without malice, and further that plaintiff has not sustained any actual damages from the wrongful act of the bank. Where, upon the facts alleged in the complaint, or found by the jury, the statute is applicable, there is no liability merely because the law presumes damages from the wrong done, which are nominal in amount. A complaint is subject to demurrer only when it appears from the facts alleged therein that the nonpayment of the check was through error or mistake, without malice, and that no actual damage resulted to the depositor from such nonpayment, for in such case the statute is applicable. If the statute is not applicable, the bank may, upon well-settled principles, be liable to its depositor, not only for nominal or actual damages, but also for punitive damages.

It was error to hold that the statute is applicable in this action, and that defendant was relieved thereby of liability. Plaintiff has alleged in his complaint a cause of action, and the judgment sustaining the demurrer and dismissing the action is

Reversed.

AMERICAN WHOLESALE CORPORATION v. P. L. COOPER.

(Filed 16 November, 1927.)

1. **Partnership—Dissolution—Notice—Publication—Debtor and Creditor.**

Creditors residing beyond the State who have been selling goods to a partnership doing business in this State, are entitled to notice of the dissolution of the firm beyond that implied by publication in a newspaper published locally to the place wherein the partnership business has been conducted, unless it is made to appear that the seller of goods thereafter to the concern either read the newspaper in which the notice of dissolution appeared, or was reasonably put upon constructive notice by some peculiar circumstances under the conditions existing.

2. Same—Evidence—Deeds and Conveyances—Registration.

The statutory expressed purpose for which a deed or conveyance of property is required to be registered in order to give notice thereof, does not include that of dissolution of a partnership, in this case a deed of trust to the retiring partner, and is incompetent evidence to fix a foreign creditor with notice of its dissolution, and to relieve the retiring partner from liability for the indebtedness of the concern to those who thereafter continued to sell its goods, upon the credit of the partnership theretofore existing.

CIVIL ACTION, before *Barnhill, J.*, at September Term, 1927, of ALAMANCE.

The evidence tended to show that the defendant and E. J. Richmond had formed a partnership for mercantile purposes under the name of Richmond-Cooper Company. This partnership purchased goods from the plaintiff during the years 1921, 1922, and 1923, prior to 1 July, 1923. On 28 June, 1923, E. J. Richmond delivered to the plaintiff as a basis of credit a financial statement, signed "Richmond-Cooper Co., by E. J. Richmond." The plaintiff alleged "that during the years 1921, 1922, and 1923, the plaintiff sold and delivered to the Richmond-Cooper Company, of which the defendant was a partner at said times and years, goods, wares, and chattels amounting to $14,862.59, and received therefor on payment of said sum only the sum of $12,513.72; that there is due and owing plaintiff on account of said sales and goods the sum of $2,331.87."

The defendant Cooper denied that he was indebted to the plaintiff in any sum, and as a defense to said action contended that the partnership existing between himself and E. J. Richmond had been dissolved, and that notice of dissolution of the partnership had been published in the *Mebane Enterprise,* a newspaper published in Alamance County, North Carolina. This notice was published once a week for four successive weeks, beginning with issue of 26 April, 1923. The defendant Cooper offered in evidence a deed of trust made by E. J. Richmond, trading as E. J. Richmond Company, dated 21 May, 1923, to T. C. Carter, trustee, and P. L. Cooper, party of the third part. This deed of trust "covered the stock of merchandise that was formerly the stock of the Richmond-Cooper Company," and was offered to show notice to the plaintiff of the dissolution of the partnership, it having been recorded in the office of the register of deeds of Alamance County.

The following issues were submitted to the jury:

(1) Was the partnership composed of E. J. Richmond and P. L. Cooper dissolved on or about 15 May, 1923, as alleged?

(2) Was the plaintiff duly notified of such dissolution?

(3) What amount is the plaintiff entitled to recover of the defendant, P. L. Cooper?

The case was originally tried in the county court, and the judge of the county court directed the jury to answer the first issue "yes." The jury answered the second issue "yes," and from judgment rendered in the county court in favor of the defendant Cooper, the plaintiff appealed to the Superior Court, assigning errors. Barnhill, J., holding the Superior Court, after hearing the exceptions on the appeal from the county court, reversed the judgment of the county court, sustaining exception No. 5, and remanding the case to the General County Court of Alamance County for a new trial.

Exception No. 5 sustained by the Superior Court judge is as follows: "To the Court's overruling plaintiff's objection to the introduction of the deed of trust, dated 21 May, 1923, made by E. J. Richmond, trading as E. J. Richmond Company, to T. C. Carter, trustee, and P. L. Cooper."

Long & Allen and Biggs & Broughton for plaintiff.
Thomas C. Carter for defendant.

BROGDEN, J. Is a deed of trust executed by one partner to a trustee for the other partner upon the partnership property and duly recorded, notice to a foreign creditor of the dissolution of the partnership?

The evidence in this case discloses that the plaintiff is a Maryland corporation, and the defendant Cooper is a resident of Alamance County, North Carolina. The defendant, P. L. Cooper, and E. J. Richmond had formed a partnership under the name and style of Richmond-Cooper Company. This partnership had been purchasing goods from the plaintiff since 1921. On 28 June, 1923, E. J. Richmond purchased from plaintiff a bill of goods, giving at the time promissory note for the purchase price, signed in the name of Richmond-Cooper Company, by E. J. Richmond. The evidence of plaintiff tended to show that it had never seen the notice of dissolution published in the *Mebane Enterprise* and had never seen the deed of trust or had any notice of the dissolution of said partnership, and that it first learned of the dissolution in January, 1924.

This Court considered the question of sufficiency of notice of dissolution of a partnership in *Strauss v. Sparrow,* 148 N. C., 309. The rule of law governing notice of dissolution is thus stated: "It is well established that when an ostensible or known partner retires from a firm which continues the business, in order to protect him from liability for future obligations of the partnership proper notice of his retirement must be given. Ordinarily, when a creditor seeking to enforce recovery against such a partner has never had any dealings with the firm, a notice published in a local paper having a general circulation, in a full and proper manner and for a reasonable length of time, will be regarded as sufficient. Where, however, the creditor claimant has been a customer of the firm, actual notice must be shown or the existence of such facts brought home to the creditor as would put a person of reasonable business prudence on inquiry which would lead to knowledge of the dissolution of the firm or the retirement of the partner resisting the claim. In such case, and particularly when a former customer is resident in a distant community, publication of notice in a local paper is not as a rule recognized as sufficient of itself to affect the customer with notice or to carry the question to a jury, unless it can be further shown that the creditor was in the habit of reading the paper at the time a proper publication was being made, or that a copy of same containing the publication was especially sent to him."

Again, in *Furniture Co. v. Bussell,* 171 N. C., 474, the Court held: "It may be conceded that an outgoing member of a firm should take his name out with him, for if he leaves it behind he will be considered as still holding himself out as a partner, whatever may be his real relation to the firm, unless he gives notice of his withdrawal to those who dealt with the firm or were its customers while he was a partner."

In *Bynum v. Clark,* 125 N. C., 352, the partnership formed a corporation, and the corporation purchased the assets of the partnership. After the formation of the corporation one of the partners purchased goods from the plaintiffs. The plaintiffs had no actual notice of the formation of the corporation nor of the dissolution of the partnership. *Faircloth, C. J.,* writing for the Court, says: "The only question is: Can the plaintiffs recover, they having had no actual notice of the dissolution of the partnership or of the formation of the corporation? We think they can. In such cases, actual notice must be given, especially to those who had previous dealings with the partnership."

Applying these principles of law to the facts in the case at bar, we are of the opinion that the deed of trust and the registration thereof in itself constituted no notice of the dissolution of the firm to a nonresident creditor.

The identical question was considered by the Supreme Court of Arkansas in the case of *Bluff City Lumber Co. et al. v. Bank of Clarks-*

ville et al., 95 Ark., p. 1, 128 S. W., p. 58. In that case the court was requested by the defendant to instruct the jury as follows: "You are instructed that when the deed of trust introduced in evidence was executed and filed for record, conveying the property of the Clarksville Lumber Company and the real estate of the defendants, D. R., A. D., and E. T. Reynolds, to secure the indebtedness of the Bluff City Lumber Company, the filing of the said deed of trust was notice of its contents to every one, and the plaintiffs cannot plead ignorance of its contents." The opinion declares: "The appellants contend that the trial court erred in refusing to so instruct; but it did not. The record of a deed is only constructive notice of that for which it is required. As it is not required to give notice of the dissolution of partnership, it does not subserve that purpose." The registration act of Arkansas provides in substance that "every deed or instrument in writing, which is required by law to be recorded, shall be constructive notice to all persons from the time of record."

We conclude, and so hold, that the order of Judge Barnhill remanding the case for trial, for the reason given, was a correct ruling.

Affirmed.

CRAVEN COUNTY v. RICHARD PARKER AND J. C. RASBERRY.

(Filed 16 November, 1927.)

1. **Taxation—Counties—Foreclosure—Sales—Notice—Statutes.**

In an action by the county to foreclose upon the lands of a delinquent taxpayer for the nonpayment of his taxes, C. S., 8037, due for 1920, and since, the notice required by chapter 159, section 51, Public Laws of 1897, construed as a condition precedent to the sale, is superceded by C. S., 8014, requiring the sheriff before making such sale to give public notice of the time, place and cause thereof, with such other notice required by the preceding section, 8013, that the sheriff serve upon the delinquent at least twenty days before the sale of his real property, a copy of so much of the advertisement as relates to him.

2. **Same—Purchase—Title.**

In an action by a county to foreclose upon the real property of a delinquent taxpayer, it is not required for the plaintiff to show that the sheriff had served a copy of the advertisement on the delinquent as provided by C. S., 8013, and his failure in this respect is not regarded as fatal to the maintenance of the county's action to foreclose, C. S., 8028, 8029; and, *held further*, the county, when the purchaser, is not required to make affidavit of the fact of notice given under the section 8029.

3. **Same—Personal Property—Lands—Real Property.**

C. S., 8006, providing for the sale of the personal property of the delinquent taxpayer before that of his realty, is for the benefit of the taxpayer, and the failure of the sheriff to comply therewith does not affect the title of the purchaser at the sale under foreclosure of the realty for taxes.

4. **Same—Description of Lands—Parol Evidence.**

The description of the real property advertised to be sold by the sheriff of the county for nonpayment of the taxes of a delinquent giving his name and the number of acres "Washington Road, No. One Township," is not too vague for or uncertain to admit of parol testimony of identification, when the designated owner has but one tract of real estate in the county advertising the sale in its proceedings to foreclose.

5. **Same—Penalties—Interest—Judgments.**

In an action by the county to foreclose on the real property of a delinquent taxpayer, the statutory penalty applies, and the defendant cannot successfully maintain that before final judgment only straight interest is recoverable.

APPEAL by defendants from *Harris, J.,* at September Term, 1927, of CRAVEN.

Action to foreclose certificates of sale of real estate for taxes heard and determined upon the following facts:

1. The plaintiff is a municipal corporation of the State of North Carolina, with the power of levying taxes upon property situate therein.

2. That during the years 1920, 1921, 1922, 1923, and 1924, Richard Parker, the defendant, was the owner of said land, and J. C. Rasberry, the defendant, had a mortgage given for the purchase price upon the same. That the taxes for the year 1920 was $161.40; for 1921, $121.26; for 1922, $128.72; for 1923, $166.26, and for 1924, $164.30.

3. In 1920, the said Richard Parker listed personal property for $858.00; in 1921, for $740.00; for 1922, $680.00; in 1923 for $370.00, and in 1924 for $288.00.

4. On 1 October, 1921, Richard Parker, in whose name the land was assessed for taxes, owned personal property in excess of the sum of $161.40; that in August, 1922, Richard Parker owned personal property in excess of $121.26; that in October, 1923, the said Richard Parker owned personal property in excess of $128.72; and in October, 1924, Richard Parker owned personal property in excess of $166.20; and in December, 1925, Richard Parker owned personal property in excess of $164.30, and that the taxes now sought to be collected against the land include taxes assessed against the personal property for each year.

5. No levy was made for the taxes for 1920, 1921, 1922, 1923, or 1924, on the personal property of the said Richard Parker for the taxes then due by said Richard Parker.

6. No notice was ever served upon Richard Parker or the defendant, J. C. Rasberry, in regard to the taxes for 1920, 1921, 1922, 1923 and 1924, except the usual newspaper notice of the sale of land by the sheriff for taxes. The reference to which land in said advertisement was as follows: "Richard Parker, 250 acres, Washington Road, No. One Township," and no other description was given or notice made, and this notice was published in a newspaper published in New Bern, N. C., Craven County; that said 250 acres was the only land owned by Richard Parker in Craven County.

7. The defendant, J. C. Rasberry, then lived and now lives in Lenoir County at Kinston, N. C., and the defendant Richard Parker lived at Vanceboro, Township No. 1, Craven County, and neither the defendant Rasberry nor Parker was a subscriber to said paper, and the first notice that the defendant, J. C. Rasberry, had of any claim for taxes by the plaintiff was the issuance of the summons in this action, but repeated notices had been mailed to Parker, and one left at his home by the sheriff before the commencement of this suit.

8. The only description of the land in the certificate issued by the county following said sale was "250 acres, Washington Road," listed to Richard Parker.

9. The defendant, Rasberry, during the years in which this land was sold for taxes, and for which suit is brought, held a mortgage upon said land, and the amount due under said mortgage for which the land is the only security does not exceed the amount claimed by the plaintiff for taxes with the interest thereon.

10. The defendant, J. C. Rasberry, has tendered to the plaintiff the full amount of taxes due on said land in accordance with the record of the taxes assessed during the years and each year thereof, and in addition thereto has tendered to the plaintiff the amount of the aforesaid taxes, together with six per cent interest on the taxes from the date of sale thereof, and the plaintiff has declined and refused to accept such tender.

The court gave judgment in favor of the plaintiff for the taxes, cost of sale, interest and penalties due by the defendant Parker, owner and mortgagor, and appointed a commissioner to sell the land if not redeemed within the time specified. The exceptions are noted in the opinion.

R. E. Whitehurst for plaintiff.
Moore & Dunn and F. E. Wallace for defendants.

ADAMS, J. It is made the duty of the board of commissioners or other governing body of a county to foreclose certificates held by the county for the sale of real estate for taxes. C. S., 8037. For this purpose the plaintiff brought suit against the defendant Parker, owner and mortgagor of the land, and the defendant, Rasberry, who is mortgagee. The only answer filed is that of Rasberry. He attacks the judgment on the ground that the sheriff failed to serve on the delinquent taxpayer a copy of the advertisement of sale as provided by C. S., 8013, and cites *Matthews v. Fry,* 141 N. C., 582, as authority for this position. That was an action for the recovery of land in which the defendant relied upon title alleged to have been acquired at a sale for the nonpayment of taxes. The decision turned on the construction of certain sections of chapter 159, Public Laws 1897. Section 51 provided that before any real estate should be sold for taxes the sheriff or tax collector should personally serve a written or printed notice of such sale on the delinquent taxpayer or his agent at least thirty days before the sale if the delinquent resided in the county. It was held that the defendant had acquired no title because the sheriff had failed to serve the notice. It was made to appear in addition that the sheriff had not given any notice of the sale by publication. Section 51 seems to have been construed as a condition precedent. But a material change has been made and the statute now reads, "Before any real estate shall be sold for taxes the sheriff shall give public notice of the time, place and cause of such sale by advertisement," etc. C. S., 8014. Other notice to the delinquent is provided for in the preceding section: "In addition to this advertisement the sheriff shall, at least twenty days before a sale of real estate for taxes, serve upon each delinquent taxpayer whose real estate is advertised for sale . . . a copy of so much of the advertisement as relates to him and his real estate." In *King v. Cooper,* 128 N. C., 347, cited in *Matthews v. Fry, supra,* it was said: "We think the notices and publication presumed under section 69(7) (Laws 1897, ch. 169) to have been given are those required of the sheriff by section 51 of the act, but the notices required with so much particularity to be given by the purchaser under the new sections, 64 and 65 (C. S., 8028, 8029), must be proved by him." Section 8029 provides that the purchaser shall make affidavit that he has complied with the preceding section; but the affidavit is not required when the county is the purchaser. It would seem to follow that in a suit to foreclose the certificate, the decision in *Sanders v. Earp,* 118 N. C., 275, and *Geer v. Brown,* 126 N. C., 238, is controlling, and that the officer's failure to serve a copy of the advertisement on the delinquent should not be construed as fatal to the action.

The appellant contends that the sale was invalid because the sheriff did not first levy upon and sell the delinquent's personal property.

The statute provides that the personal property of the taxpayer shall be sold before resort can be had to his real estate, and that upon service of notice that his real estate is to be sold for taxes, it shall be incumbent upon him to point out the personal property out of which the taxes should be made. C. S., 8006. It is admitted that the notice was not given. It is argued that it was therefore not required of the defendant Parker to direct the officer to his personal property. The statute just cited was enacted primarily for the benefit of the taxpayer and not in detriment of the purchaser's title. Accordingly, it has been held that although the sheriff may be liable to the tax debtor if he sells real estate for taxes before resorting to personal property, still such failure will not affect the title conveyed by the sheriff's deed. *Stanley v. Baird,* 118 N. C., 75; *Geer v. Brown, supra; Cherokee v. McClelland,* 179 N. C., 127, 132. Moreover, the Machinery Act provides "that where actual sales of real estate are made for taxes under the general laws of the State the taxpayer whose real estate has been sold for taxes shall be precluded thereafter from attacking such sale on the ground that the tax could have been procured from personal property." P. L. 1925, ch. 102, secs. 99, 111.

The land was advertised under this description: "Richard Parker, 250 acres, Washington Road, No. One Township." That this description was indefinite is another ground upon which it is contended that the tax sale was not valid. It is admitted that this is the only land owned by Richard Parker in Craven County. The description given evidently embraces 250 acres, situated on Washington Road in Number One Township, owned by Richard Parker; and the description is sufficiently definite to sustain the certificate which the plaintiff seeks to foreclose. *Proctor v. Pool,* 15 N. C., 370; *Ritter v. Barrett,* 20 N. C., 266; *Kitchen v. Herring,* 42 N. C., 190; *Moses v. Peak,* 48 N. C., 520; *Farmer v. Batts,* 83 N. C., 389; *Blow v. Vaughan,* 105 N. C., 199; *Norton v. Smith,* 179 N. C., 553. The case of *Bryson v. McCoy* is distinguishable. There the notice of sale was "Beaverdam Township. T. D. Bryson heirs, acres 400, amount $10.00"; but T. D. Bryson's interest was a one-half interest in 70 acres, 200 acres, and 331 acres, according to the grants. In the case before us there is no such discrepancy in description, the only point being whether the land in question can be identified.

The appellant finally contends that the plaintiff in any event can recover nothing more than the taxes due and interest thereon at 6 per cent. "In every action brought under this section, whether by a private individual or by the county or other municipal corporation, or any other corporation, the plaintiff shall, except in cases otherwise provided by law, be entitled to recover interest at the rate of 20 per centum per annum on all amounts paid out by him, or those under whom he claims, and evidenced by certificates of tax sale, deed under tax sale, and tax receipts. Such interest shall be computed from date of each payment up to the time of redemption or final judgment, and shall be added to the principal of the final judgment, which judgment shall bear interest as in other cases."

The amendment prohibits the board of county commissioners from remitting any of the penalties prescribed in the section after action is brought for foreclosure. P. L. 1925, ch. 109. Judgment

Affirmed.

MINERVA INMAN, ADMINISTRATRIX OF WALTER INMAN, v. GULF REFINING COMPANY, HECTOR McMILLAN AND GORDON McMILLAN.

(Filed 23 November, 1927.)

1. **Principal and Agent—Contracts—Scope of Employment—Negligence—Respondeat Superior—Independent Contractor.**

   Where under a contract with a local dealer a refining company is to supply the latter with gasoline to be sold at a price to be named by it with a fixed compensation to the dealer, the latter to effect delivery to his customers at his own expense: *Held*, the refining company is not responsible in damages for the negligent death of plaintiff's intestate caused by the dealer's delivering to him for repairs a gasoline tank partly filled with gasoline, it having no control over or interest in the means or methods used in respect to the act complained of, or falling within the scope of the dealer's employment or within the principle usually applying in matters of agency.

2. **Judgments—Verdict—Motion to Set Aside Verdict—Consent—Discretion of Court—Interest—Appeal and Error.**

   A defendant by consenting to plaintiff's motion to set aside the answer to an issue, may not insist thereon as a matter of legal right as against a codefendant who objects and has an interest therein.

APPEAL by plaintiff and the individual defendants from *Barnhill, J.*, at April Term, 1927, of ROBESON.

The plaintiff brought suit to recover damages for the death of her intestate alleged to have been caused by the negligence of the defendants. On 1 April, 1920, the Gulf Refining Company entered into a written contract with E. B. McMillan. The plaintiff alleged that E. B. McMillan was the agent of the Gulf Refining Company and

Hector McMillan and Gordon McMillan its employees; that on 8 December, 1925, the defendants carried to the intestate's blacksmith shop for repairs a gasoline tank which was placed and borne upon a truck; that the tank exploded and killed the intestate while he was at work on it; that the defendants had negligently left gasoline in the tank, and that their negligence was the proximate cause of the explosion and death. The following verdict was returned:

1. Was the death of Walter Inman caused by the negligence of the defendant, Gordon McMillan? Answer: Yes.

2. Was the death of Walter Inman caused by the negligence of the defendant, Hector McMillan? Answer: Yes.

3. Was the death of Walter Inman caused by the negligence of the defendant, Gulf Refining Company? Answer: No.

4. Did negligence on the part of Walter Inman contribute to his death? Answer: No.

5. Did Walter Inman assume the risk of being killed by the explosion of the tank? Answer: No.

6. What damage, if any, is the plaintiff entitled to recover? Answer: $4,500.

7. Is the liability of the defendant, Gulf Refining Company, secondary? Answer: Yes.

The material parts of the contract between the Gulf Refining Company and E. B. McMillan are as follows:

"Party of the first part (Gulf Refining Company) agrees to ship to party of the second part (E. B. McMillan) lubricating oils, illuminating oils, and gasoline, in carload lots, which shipments are to be received by the party of the second part and sold by him at prices named by party of the first part—all sales of such oils to be for cash, if on credit, only to such parties as are acceptable to party of the first part and upon terms authorized by them.

"Where first party orders second party to sell on credit, second party shall deliver a signed receipt, or in case the oil is shipped out of the city of Lumberton, N. C., second party will deliver an original bill of lading from railroad company, which shall constitute a receipt.

"Party of the second part is to be responsible to the party of the first part for all goods shipped to him and is to account for all sales in accordance with above paragraph, sending twice weekly a statement showing all sales made and remitting twice weekly to party of the first part, at their Atlanta, Ga., office, all moneys received by him from sale of above-named goods. Second party shall render to party of the first part statement on the first day of each month, showing in detail the goods on hand.

"Second party agrees to pay all drayage and delivery charges, and collect all empty drums and barrels and ship same back to first party as ordered.

"It is strictly understood that all goods shipped party of the second part by party of the first part are the property of the first part until sold.

"Lumberton, N. C. Circuit points to be made by wagons are as follows: Fairmont, Pembroke, Rowland, Raynham, Red Springs, Buie, Tolarsville, St. Paul, McDonald, Tar Heel, Proctorville, Lowe, Powers, Bladenboro, Richardson.

"On or about the first of each month, party of the first part will send to party of the second part a statement showing the sales made by party of the second part during the preceding month, remitting party of the second part commission earned on such sales, said commission to be 2 cents per gallon on kerosene and gasoline when sold in milk cans or tank wagons, and 2 cents per gallon when sold in original package such as drums, barrels, cans or cases, and 10 per cent of invoice price on lubricating oils, where oil is delivered by party of the second part without payment of railroad freight charges. Where shipments are made by railroad, commission to party of the second part is to be 2 cents per gallon on kerosene and gasoline and .... per cent of the invoice on lubricating oils, and party of the first part is to allow party of the second part amount of freight paid on such shipments.

"Party of the first part reserves the privilege of making shipments from its stock of goods in hands of second party, and second party agrees to fill such orders as may be sent them by party of the first part—no commission to be allowed party of the second part on such shipments, but first party will pay second party 25 cents per barrel for drayage and clerical work in making such shipments."

Judgment. Appeal as noted upon errors assigned.

Britt & Britt and E. J. and L. J. Britt for plaintiff.

Varser, Lawrence, Proctor & McIntyre for Gulf Refining Company.

Dickson McLean and H. E. Stacy for Hector McMillan and Gordon McMillan.

PLAINTIFF'S APPEAL.

ADAMS, J. Interpreted in the light of his Honor's instructions the verdict established the written instrument executed by the Gulf Refining Company and E. B. McMillan as the only contract under which McMillan Brothers conducted their business. Whether under this contract McMillan Brothers were servants or employees of the Gulf Refining Company is the principal question in the plaintiff's appeal. On this point the jury were instructed to answer the third issue in the negative if they found from the evidence that the business of McMillan Brothers was carried on pursuant to and in accordance with the written contract—an instruction in substance that according to its provisions they were not employees of the codefendant.

In considering the question we need not enter into an extended discussion of the law of agency or of the relation existing between master and servant. It is generally conceded that an independent contract is a limitation upon the master's liability—that is, that the person who lets the contract, having no control over the contractor's employees, is not liable for their torts. Street's Foundations of Legal Liability, Vol. 2, p. 471. It is for this reason that the right of control, or interest in the means by which the work is done, is a test frequently applied in determining whether the person employed is really a servant or whether he acts in some other capacity. *Craft v. Timber Co.,* 132 N. C., 152; *Young v. Lumber Co.,* 147 N. C., 26; *Beal v. Fibre Co.,* 154 N. C., 147; *Denny v. Burlington,* 155 N. C., 33; *Gadsden v. Craft,* 173 N. C., 418; *Simmons v. Lumber Co.,* 174 N. C., 220; *Aderholt v. Condon,* 189 N. C., 748; *Greer v. Construction Co.,* 190 N. C., 632; *Drake v. Asheville, ante,* 6. The principle has been concisely stated as follows: "The accepted doctrine is that, in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated, as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed." Labatt's Master and Servant, Vol. 1 (2 ed.), p. 222, sec. 64.

It is important that we bear in mind the limitation of the agreement. E. B. McMillan was named as the second party, but Gordon McMillan testified that McMillan Brothers were the beneficial parties and that they transacted the business. They were to be responsible for all goods shipped them and twice weekly to account for all sales; they were to pay all drayage and delivery charges, to return all empty drums and barrels, to sell at fixed prices, and to retain a designated compensation. The goods shipped were to remain the property of the Gulf Refining Company until they were sold; but the trucks by which they were transported and delivered were the property of McMillan Brothers. The contract did not create such relation between the Gulf Refining Company and its codefendants as would subject the former to liability on the theory that the act resulting in the intestate's death was an act performed in the course and scope of a servant's employment.

Other courts have had occasion to construe the contract in question. In *Phipps v. Gulf Refining Company,* 103 S. E. (Ga.), 472, a verdict for the defendant was directed and on appeal the judgment was affirmed. The contract again came before the Court of Appeals of Georgia in *Gulf Refining Company v. Harris,* 117 S. E., 274. As it did not appear that the Gulf Refining Company had retained any control over the means or methods to be employed by the local dealer the court held that there was no liability growing out of the relation of master and servant. It was said that the relation does not exist where the employer merely engages another to do a particular work, but retains no right or power to direct or control the method by which the result is to be accomplished. In *Sams v. Arthur et al.,* 133 S. E. (S. C.), 205, it appeared that a contract identical with the one before us was executed by the Gulf Refining Company and W. D. Arthur. The plaintiff brought suit against both parties to recover damages caused by a collision between a milk wagon and an oil truck belonging to Arthur. The Court construed the contract as creating the relation of principal and factor and concluded that the Gulf Refining Company was not liable under the doctrine of respondeat superior or of that expressed in the maxim, *Qui facit per alium facit per se,* and that a verdict should have been directed in favor of the Refining Company.

As to the question under discussion, it is immaterial whether McMillan Brothers were factors or independent contractors, for in neither event as a general rule could they have occupied the technical relation to their codefendant of servants or employees.

The plaintiff contends, however, that they were independent contractors and that the inherent danger of the business in which they were engaged made the case an exception to the rule and prohibited the Refining Company from contracting against its liability. The liability of the owner or proprietor for the acts of the independent contractor may be determined by the four rules laid down by Judge Cooley in his work on Torts and quoted in *Hunter v. R. R.,* 152 N. C., 682. Obviously the Refining Company is not liable by reason of the operation of the last two; as to the first it was in no wise responsible for the repair of the tank and therefore did not cause "the precise act to be done which occasioned the injury"; and as to the second it may be said that the alleged contractors were not engaged in the prosecution of the business contemplated by the contract.

The judge submitted to the jury the plaintiff's contention that there was an implied agency which, without regard to the contract, established the liability of the Refining Company, but this contention was not accepted by the jury evidently because they were convinced that the contract was the only agreement between the parties.

In the plaintiff's appeal we find

No error.

APPEAL OF MCMILLAN BROTHERS.

ADAMS, J. The plaintiff in apt time made a motion that the verdict be set aside on the ground that the answer to the third issue was against the weight of the evidence. The motion was denied. McMillan Brothers, defendants, consented that the entire verdict be set aside, and now present the question whether they were entitled to have their motion granted as a matter of law. The Gulf Refining Company did not consent; its interest in the verdict was no less pronounced than that of the codefendants; and the latter had no legal right by consenting to the plaintiff's motion to deprive the Gulf Refining Company of the finding which exempted it from liability. On the appeal of the individual defendants the judgment is

Affirmed.

T. R. BRANN v. W. M. HANES ET AL.

(Filed 23 November, 1927.)

1. **Appeal and Error—Process—Service—Publication—Attachment—Review.**

   The findings of fact, supported by the evidence and approved by the judge, on motion made by special appearance, to dismiss an action on the ground that the defendant, on whom service was made by publication and attachment in case of nonresidence, C. S., 484(3), 799(2), was in fact a resident of the State having the *animus revertandi: Held*, not subject to review on appeal to the Supreme Court.

2. **Process—Summons—Publication—Attachment—Nonresident— Animus Revertandi.**

   One who has left the State for an indefinite time, his return depending upon a doubtful contingency, is a nonresident for the purpose of service of summons by publication and attaching his property in this State in order to bring him under the jurisdiction of our courts, and his motion made by special appearance to vacate the attachment on this ground will be denied. C. S., 484(3), 799(2).

3. Same—Lien of Attachment—Courts—Jurisdiction.

Where the service by publication and attachment on a defendant absent from the State comes within the provisions of C. S., 484(3), 799(2), and thereunder his property here has been attached as required to give validity to the publication of service, he may submit himself to the jurisdiction of the court and relieve his property of the levy in attachment.

APPEAL by defendant, W. M. Hanes, from order of *Harding, J.*, dated 17 June, 1927. From FORSYTH. Affirmed.

Action to recover of defendants, officers and directors of an insolvent bank, a sum of money on deposit in said bank, to the credit of plaintiff at the date of the appointment of a receiver therefor.

In his complaint plaintiff alleges that said deposit was received when the bank, to the knowledge of defendants, was insolvent, and further that its insolvency, resulting in loss to him as a depositor, was caused by negligence of defendants, as officers and directors of said bank. Upon these allegations he contends that defendants are personally liable to him for his loss.

The summons in the action was personally served on all the defendants, except W. M. Hanes. As to him, the summons was returned with the following endorsement by the sheriff of Forsyth County: "Not executed as to W. M. Hanes, after due diligence. W. M. Hanes cannot be found in Forsyth County."

Warrant of attachment and order for service of summons by publication on defendant, W. M. Hanes, were issued by the clerk of the Superior Court of Forsyth County. The said clerk found from affidavits duly filed that W. M. Hanes is a nonresident of the State of North Carolina; that he has property in said State, and that plaintiff has a cause of action against said W. M. Hanes, as set out in his duly verified complaint. Said warrant and order are both dated 25 January, 1927, and were returnable before said clerk on 28 February, 1927.

On 31 January, 1927, attorneys for said defendant entered a special appearance in this action in his behalf and moved before the clerk that the attachment levied upon his property in Forsyth County, pursuant to said warrant, be vacated, for that said W. M. Hanes is not and never has been a nonresident of the State of North Carolina; it was alleged that he is now, and at all times during his life has been a resident of said State.

At the hearing of said motion, upon findings of fact made by the clerk from affidavits filed by both defendant and plaintiff, an order was entered denying the motion. From this order defendant appealed to the judge of the Superior Court holding the courts of Forsyth County.

The said judge sustained the findings of fact made by the clerk and affirmed his order.

From the order of the judge, affirming the order of the clerk, and denying the motion to vacate the attachment, defendant appealed to the Supreme Court.

Manly, Hendren & Womble and Fred M. Parrish for plaintiff.

Swink, Clements & Hutchins, Brooks, Parker, Smith & Wharton and Edwin J. Martinet for defendant.

CONNOR, J. The sole question presented for decision by this appeal is whether there was error in holding that W. M. Hanes was a nonresident of the State of North Carolina, at the date on which the warrant of attachment and order for service of summons by publication were issued in this action within the meaning of C. S., 484, subsection 3, and of C. S., 799, subsection 2. The Court so held upon the facts found from the evidence offered at the hearing of the motion to vacate the attachment solely upon the ground that said W. M. Hanes was not a nonresident of the State at said date. The findings of fact made by the clerk and sustained by the judge are supported by the evidence; we must, therefore, on the appeal to this Court, take such facts as true, for it is well settled that on an appeal to this Court, from an order made by the judge sustaining findings of fact made by a clerk of the Superior Court, on a motion made before the clerk to vacate an attachment, the findings of fact made by the clerk and sustained by the judge are not reviewable. They are conclusive upon an appeal to this Court, where they are taken as true, when there is evidence in support of the findings. *Hennis v. Hennis,* 180 N. C., 606; *Mfg. Co. v. Lumber Co.,* 177 N. C., 404; *Lumber Co. v. Buhmann,* 160 N. C., 385.

It appears from the findings of fact made by the clerk, and approved by the judge, all of which are set out in the order from which defendant has appealed to this Court, that prior to 1 January, 1926, W. M. Hanes was a resident of Winston-Salem, N. C., where he had been actively engaged in business for many years; that in October, 1925, he became desperately ill, suffering a relapse from tuberculosis, from which disease he had suffered, intermittently, since 1913; that while thus desperately ill, on or about 1 January, 1926, he was taken from his home in Winston-Salem, N. C., to Saranac Lake, in the State of New York, where he has maintained for many years a winter home, which he and his family had, during previous years, occupied from time to time.

Prior to 1 January, 1926, while at his winter home at Saranac Lake, the said W. M. Hanes always intended to return to his home in Winston-Salem, after remaining at Saranac Lake for a definite time, and in accordance with such intentions he has heretofore so returned. Since 1 January, 1926, he has resided continuously at Saranac Lake, not having returned to North Carolina at any time; since said date he has been and is now very ill, under the constant care of physicians and nurses; his return to Winston-Salem is altogether contingent upon his recovery, and while he intends to return to North Carolina upon the recovery of his health, the duration of his residence in the State of New York and of his absence from the State of North Carolina is uncertain and indefinite, because of the nature of his illness. His physicians, while hopeful of his recovery, are unable to state with any degree of assurance that he will recover his health to such an extent, at least, that he will be able to leave New York and return to North Carolina, nor are they able to predict, if he shall recover, when he will be able to do so. The said W. M. Hanes has property interests in Winston-Salem, N. C., of large value; he also owns property of considerable value at Saranac Lake, N. Y. He is a very wealthy man, and for many years has been a director of the bank which has become insolvent because, as alleged by plaintiff, of the negligence of its officers and directors, with the result that plaintiff and other depositors have sustained heavy losses.

Upon the foregoing facts there is no error in the holding that W. M. Hanes is a nonresident of the State of North Carolina, within the meaning of C. S., 484, subsection 3, and of C. S., 799, subsection 2, and the order denying the motion of defendant to vacate the attachment upon his property pursuant to the warrant issued in this action, upon the ground that he is not a nonresident of this State, is affirmed.

Whether or not the defendant has retained his domicile in this State, is not determinative of the question here presented for decision. In *Wheeler v. Cobb,* 75 N. C., 21, it is said that one may be a nonresident without losing his domicile or rights of citizenship in the State of his origin or gaining a domicile in another State. It is there held that one may have his domicile in North Carolina, and his residence elsewhere, and that, therefore, where one voluntarily removes from this to another State, for the purpose of discharging the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time, such person is a nonresident of this State for the purpose of attachment, notwithstanding he may visit the State and have the intent to return at some time in the future. This principle has been uniformly and consistently approved in subsequent decisions of this Court. *Ransom v. Comrs., ante,* 237; *Roanoke Rapids v. Patterson,* 184 N. C., 135;

Mahoney v. Tyler, 136 N. C., 41; *Howland v. Marshall,* 127 N. C., 427; *Chitty v. Chitty,* 118 N. C., 647; *Fulton v. Roberts,* 113 N. C., 422; *Carden v. Carden,* 107 N. C., 215.

In *Chitty v. Chitty,* 118 N. C., 647, *Faircloth, C. J.,* says: "The definitions of 'residence' are sometimes apparently conflicting, owing mainly to the nature of the subject with which the word is used, the purpose being always to give it such meaning and force as will effectuate the intention of that particular statute." The statutes providing for service of summons by publication, and attachment of property within the State, were enacted for the purpose of enabling the courts of this State in cases to which the statutes are applicable, to acquire jurisdiction to pass upon and adjudicate the rights of a plaintiff against a defendant, who has property in the State, but upon whom summons cannot be personally served, because of his absence from the State, and therefore not subject to personal service of process issuing from its courts. Where defendant, against whom a plaintiff has a cause of action, has property in the State, but is absent therefrom for an indefinite duration of time, with no intention to return within a period reasonably definite, he is, for the purpose of attachment of his property and service of summons by publication, a nonresident in law as well as in fact. The best evidence to the contrary would be his return to the State, where summons could be served upon him, personally, as upon other residents. Whatever be the cause of his absence from the State, if such absence prevents personal service of summons upon him during an indefinite period of time, he cannot complain that in law he is held to be a nonresident of the State for purposes of service of summons upon him, and attachment of his property situate within the State, as foundation for service of summons by publication. If upon the levy of an attachment upon his property, he promptly returns to the State, and thereby subjects himself to personal service of summons, his motion to vacate the attachment upon the ground that he is not a nonresident, would seem generally to be well sustained. If his situation be such that he cannot, without loss to himself, or without personal risk which he does not care to incur, return to the State, of which he contends that he is a resident, he may, of course, accept service of summons (C. S., 489, subsec. 3), or he may authorize his attorney to enter a general appearance for him in the action (C. S., 490), and thus meet the contention of the plaintiff that he is a nonresident. Such action on his part would be consistent with his contention that notwithstanding his absence from the State, at the time the summons and warrant of attachment were issued, he is not a nonresident of the State, but is a resident thereof, and as such, subject to personal service of summons as are other residents, whose property is not subject to attachment. If with actual knowledge that he has been made a party defendant in an action pending in a court of this State, he remains out of the State for an indefinite time, thereby avoiding personal service of summons, his conduct in that respect is inconsistent with a contention that he is a resident of the State, and that, therefore, his property in the State is not subject to attachment as a basis for the service of summons on him by publication. If he is a resident of the State, he ought to be and is subject to personal service of summons, issued by its courts, within a reasonable time after the issuance; if he is a nonresident, and has property in the State, subject to the jurisdiction of its courts, summons may be served upon him by publication, and his property may be attached, in accordance with the provisions of the statutes. It would be a reproach to the law if a defendant, who has property in this State, and against whom a plaintiff has a cause of action, could remain out of the State for an indefinite time, and thereby avoid service of summons by his contention that notwithstanding his absence from the State, he was a resident thereof and subject to personal service only. If such a defendant is a resident of the State during all the time he is absent therefrom, because he intends, upon the happening of a doubtful contingency, to return thereto, summons can be served on him only by the sheriff or other officer reading the same to him, in person, and leaving a copy with him. Manifestly this cannot be done so long as he remains out of the State. If he remains out of the State indefinitely, and can sustain his contention that in law he is a resident thereof, he becomes immune to service of process issuing out of the courts of this State. The law does not permit this, although defendant's absence from the State is caused by his misfortune, as in the instant case.

The defendant, W. M. Hanes, is not now subject to personal service of summons in this action, because he is not within the State; it is manifest, we think, from the facts appearing in this record, that he will not be subject to such service in the future within any reasonable time. He is in law as well as in fact a nonresident of the State. There is, therefore, no error in the refusal of the court, by its order herein, to vacate the attachment, which upon the facts of this cause would require the dismissal of the action, for without the attachment the service of the summons by publication would be ineffective. *Everitt v. Austin,* 169 N. C., 622.

Our decision in the instant case is supported by authorities, not only in this State, but elsewhere. See annotation in 26 A. L. R., p. 180, where many cases are cited and discussed. All the authorities sustain the following statement of the law:

"Actually ceasing to dwell within a State for an uncertain period, without definite intention as to any fixed time of returning, constitutes nonresidence, even though there be a general intention to return at some future time. *Weitkamp v. Lochr* (1886), 21 Jones & S. (N. Y.), 29."

Affirmed.

G. M. WOMBLE ET AL. v. MONCURE MILL AND GIN COMPANY AND H. V. WICKER, RESPONDENT, APPELLANT.

(Filed 23 November, 1927.)

1. **Certiorari—Appeal and Error—Courts—Discretion—Fault of Movant.**

It is within the discretion of the Supreme Court to allow the issuance of the writ of *certiorari* to bring up a case before it for review and only for good or sufficient cause, as where the failure to perfect the appeal is due to some error or act of the court or its officers, and not to any fault or neglect of the movant or his agents.

2. **Courts—Rules of Court—Enforcement—Appeal and Error.**

The rules of the Supreme Court regulating appeals are mandatory and for equal enforcement as necessary to the more prompt and careful consideration and decision of the cases appealed from, and the due and orderly consideration of appeals may not be interfered with by the Superior Courts, the Legislature, or others.

3. **Courts—Rules of Court—Statutes—Certiorari—Appeal and Error.**

The appellant from an order of the Superior Court finding him guilty as for contempt of court, and who moves for *certiorari* in the Supreme Court, shows no legal excuse for the failure of the judge to have settled the case under due and orderly procedure, when the judgment fully and in an orderly manner sets forth the necessary facts upon which it was based; the appellant has taken an unusual time in preparing and serving his case, and he has not complied with C. S., 643, with respect to the service of the case, and in other respects as required by the rules of court.

MOTION by H. V. Wicker for *alias certiorari* to have case brought up from CHATHAM and heard on appeal.

E. L. Gavin and Seawell & McPherson for respondent, movant.

STACY, C. J. In this cause pending in the Superior Court of Chatham County, the receiver of the Moncure Mill and Gin Company lodged a motion before the judge of the Superior Court, holding the courts of the Fourth Judicial District, to have H. V. Wicker attached for contempt, in that, it is alleged, the respondent unlawfully and wilfully removed certain lumber from the possession of the receiver, *scienter,* and wrongfully converted same, or the proceeds derived from a sale thereof, to his own use.

Judgment was entered 29 June, 1927, in which the facts are fully set out, the respondent adjudged to be guilty of contempt and required to pay a fine of $5.00 and the costs, and to surrender to the receiver the lumber in question or the proceeds derived from a sale thereof, in default of which, it is ordered that he be committed to the common jail of Chatham County. On 7 July, thereafter, the respondent gave notice of appeal from this judgment to the Supreme Court.

It is alleged that respondent's statement of case on appeal was served 31 August and exceptions filed thereto about 10 September, "which were immediately transmitted to the trial judge with request that he set a time and place for settling case on appeal." The respondent's application for *certiorari* was allowed 14 September, and the case set for argument at the end of the call of the docket from the Thirteenth District. No return having been made to this writ, because the case had not yet been settled, the respondent moved for an *alias certiorari* on 8 November, 1927. Consideration of this motion was continued *ex mero motu* until 15 November so that movant might have an opportunity to show merit, if any he had, by filing a detailed statement of the facts upon which the motion was based. Consideration of the motion was again continued *ex mero motu* until 17 November for further information. In a letter written to the clerk 16 November it is stated that "the above case was sent to the judge on 2 September," with request that he fix date for settling same on appeal, etc.

Assuming that the date, "2 September," stated in this letter, is erroneous, as it is at variance with the dates previously mentioned, still we are face to face with the fact that the respondent had failed to show any sufficient cause entitling him to a writ of *certiorari.*

In the first place the judgment sought to be reviewed is one as for contempt; the facts are found by the court and set out in detail; there is nothing to suggest the necessity of any unusual time in preparing the case on appeal. In the next place, it does not appear that the case should have gone to the judge for settlement at all. It was the duty of the appellant, under C. S., 643, to see that a copy of his statement of case on appeal was "served on the respondent within fifteen days from the entry of the appeal taken." This was not done. The statute further provides that "within ten days after such service the respondent shall return the copy with his approval or specific amendments endorsed or attached." This was not done. It is also provided that, "if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time provided, it shall be deemed approved." True, it is stated that the order, adjudging the respondent in contempt, "was finally heard and disposed of at Raleigh on 27 August, 1927." But this is at variance with the record, or else the whole of the record proper is not before us. Notice of appeal from the judgment of 29 June was filed in the office of the clerk of the Superior Court for Chatham County 7 July, 1927, and there is no suggestion of any extension of time, by agreement or otherwise, for preparing and serving statement of case on appeal.

Certiorari is a discretionary writ, to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right. *Waller v. Dudley,* 193 N. C., 354; *Trust Co. v. Parks,* 191 N. C., 263, 131 S. E., 637; *Finch v. Comrs.,* 190 N. C., 154, 129 S. E., 195; *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562. A party is entitled to a writ of *certiorari* when—and only when—the failure to perfect the appeal is due to some error or act of the court or its officers, and not to any fault or neglect of the party or his agent. *Trust Co. v. Parks, supra; Bank v. Miller,* 190 N. C., 775, 130 S. E., 616.

The rules governing appeals are mandatory and not directory. *Calvert v. Carstarphen,* 133 N. C., 25, 45 S. E., 353. They may not be abrogated or set at naught: (1) by act of the Legislature *(Cooper v. Comrs.,* 184 N. C., 615, 113 S. E., 569); (2) by order of the judge of the Superior Court *(Waller v. Dudley, supra),* or (3) by consent of litigants or counsel *(S. v. Farmer, supra).* The Court has not only found it necessary to adopt them, but equally imperative to enforce them and to enforce them uniformly.

For the convenience of counsel, litigants and the Court, a fixed schedule is arranged for each term of the Court and a time set apart for the call of the docket from each of the judicial districts of the State. The calls are made in the order in which the districts are numbered. It can readily be seen, therefore, that, unless appeals are ready for argument at the time allotted to the district from which they come, a disarrangement of the calendar necessarily follows, and this often results in delay and not infrequently in serious inconvenience. The work of the Court is constantly increasing and, if it is to keep up with its docket, as it is earnestly striving to do, an orderly procedure, marked by a due observance of the rules, must be maintained. *Battle v. Mercer,* 188 N. C., 116, 123 S. E., 258.

The present application for *certiorari* presents a striking illustration of the necessity and wisdom of adhering to the established rules of practice. More time has already been consumed in considering the motions, filed herein, than the case itself would have required. The appellant is not entitled to the writ on the showing made.

Certiorari disallowed.

PAGE TRUST COMPANY v. RAPHAEL W. PUMPELLY ET AL.

(Filed 23 November, 1927.)

1. **Reference—Trials—Jury—Waiver—Issues.**

Where on the appellant's motion the trial court orders a reference, the appellant's right to a jury trial upon issues submitted on exceptions duly taken is to be deemed waived, and in this case it is *held,* that the issues thus submitted were not sufficiently controverted by the adversary party.

2. **Mortgages—Bills and Notes—Actions—Foreclosure—Notes—Makers—Husband and Wife—Appeal and Error.**

In a suit to foreclose a mortgage executed by a man and his wife, the latter not having signed the notes, a personal judgment against her is erroneous.

3. **Appeal and Error—Transcript—Costs—Rules of Court—Printing.**

Held, in this case the record on appeal was much too voluminous or in excess of that required to properly present the appeal, and the appellee at whose instance it was done is taxed with the cost of mimeographing it for the excess over the sixty pages allowed by Rule 26.

APPEAL by defendant, Mrs. Amelie R. Pumpelly, and interpleaders, Lexington Grocery Company and Standard Oil Company, from *Stack, J.*, at February Term, 1927, of MOORE.

Civil action to foreclose certain mortgages and deeds of trust.

At the February Term, 1926, "on motion of Mrs. Amelie R. Pumpelly and the other parties to the action," the cause was referred under the statute to Hon. R. C. Lawrence, who, in accordance with the usual course and practice, found the facts and reported same, together with his conclusions of law, to the court. On exceptions duly filed, and after hearing had thereon, the report of the referee was modified and approved by the judge of the Superior Court. All parties gave notice of appeal, but the appeals of Mrs. Amelie R. Pumpelly, Lexington Grocery Company and Standard Oil Company are the only ones which have been perfected. The others were abandoned, or they have been dismissed on motion.

U. L. Spence and Johnson & Johnson for plaintiff.

Hoyle & Hoyle for defendant, Mrs. Amelie R. Pumpelly, and interpleaders, Lexington Grocery Company and Standard Oil Company.

Francis S. Hassell for defendant, Atlantic Joint Stock Land Bank.

STACY, C. J. The record in this case, which was first here at the Spring Term, 1926 (191 N. C., 675, 132 S. E., 594), is quite voluminous and contains more than is necessary to a proper understanding of the appeal. Indeed, its diffuseness is somewhat confusing. The immaterial matter, it is alleged, was inserted at the instance of the plaintiff. The appellee, therefore, will be allowed to recover cost of mimeographing "not to exceed sixty pages for a transcript and twenty pages for a brief." Rule 26, 192 N. C., p. 851. The balance of the cost of mimeographing the record and briefs will be taxed against the plaintiff.

The first exception imputes error to the trial court in denying appellants' motion for a jury trial on exceptions filed to the referee's report and issues tendered thereon. *Jenkins v. Parker,* 192 N. C., 188, 134 S. E., 419; *Baker v. Edwards,* 176 N. C., 229, 97 S. E., 16. The ruling might well be upheld on the ground that a jury trial was waived when the reference was ordered "on motion of Mrs. Amelie R. Pumpelly and the other parties to the action," being as it was in effect at least, a consent reference. But outside of this the issues raised by the appellants are not sufficiently controverted to call for a jury trial *(Bruce v. Nicholson.* 109 N. C., 202, 13 S. E., 790), save perhaps the question of Mrs. Pumpelly's individual liability on certain notes executed by her husband, but not by herself. As to these, the judgment will be modified so as to relieve her of any individual liability thereon. The inclusion of these notes in the judgment against Mrs. Pumpelly was evidently an oversight on the part of the learned judge who heard the case in the Superior Court. The plaintiff has asked for no judgment against her on these notes. She signed the mortgage given to secure the payment of said notes, but not the notes themselves.

The remaining exceptions are unsubstantial and call for no elaboration. They are not sustained.

Let the judgment be modified as above indicated and, as thus modified, it will be upheld.

Modified and affirmed.

STATE v. JOE BRISCOE.

(Filed 23 November, 1927.)

Intoxicating Liquor—Spirituous Liquor—Unlawful Possession—Evidence—Instructions.

Evidence in this case tended to show, and per *contra*, that defendant had in his possession three bottles of whiskey in his pocket, one hundred yards from his dwelling: *Held*, under an indictment for unlawfully possessing intoxicating liquor, an instruction to convict if the jury found beyond a reasonable doubt that the defendant had intoxicating liquor in his possession, outside of his dwelling, is *held* correct, without the additional words "for an illegal purpose."

APPEAL by defendant from *Midyette, J.*, and a jury at August Term, 1927, of GATES. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Bridger & Eley for defendant.

CLARKSON, J. J. D. Baines, deputy sheriff of Gates County, testified in part: "The defendant had three bottles of whiskey, one in his hand and two in his pockets. I know whiskey when I smell it." The defendant at the time was about one hundred yards from his dwelling-house. Testimony to like effect was given by C. W. Hinton, also a deputy sheriff. Defendant testified that he had no whiskey, but what he had was vinegar. One of the counts in the bill of indictment was that defendant did unlawfully "possess intoxicating liquors." For this he was convicted.

The defendant in his brief contends: "The court erred in charging as follows: 'It is unlawful for one to have intoxicating liquors in his possession outside of his dwelling-house in any quantity,' instead of charging as follows: 'It is unlawful for one to have intoxicating liquors in his possession outside of his dwelling-house in any quantity *for an illegal purpose.*' "

The charge as given is now well settled law in this jurisdiction. *S. v. Sigmon,* 190 N. C., 684; *S. v. Pierce,* 192 N. C., 766; *S. v. Hege, ante,* 526.

The charge of the court below is full, fair and accurate, and gave defendant every right that he was entitled to under the law. We can find

No error.

IN THE MATTER OF THE WILL OF GEORGE H. BROWN.

(Filed 23 November, 1927.)

1. **Appeal and Error—Constitutional Law.**

Under the provisions of our Constitution, Art. IV, sec. 8, the Supreme Court on appeal from an issue of *devisavit vel non*, involved in the trial of a caveat to a will, is confined to a consideration of assignments of error in matters of law and legal inference.

2. **Wills—Caveat—Proceedings in Rem—Parties.**

The proceedings to caveat a will are *in rem*, and not strictly to be regarded as adversary.

3. **Same—Deceased Persons—Transactions and Communications—Statutes—Mental Capacity—Opinions—Party in Interest—Beneficiaries.**

The beneficiary under a will may not testify to transactions and communications with the deceased, C. S., 1795, but he may in proceedings of *devisavit vel non* give his opinion, based on his own observations, as to the mental incapacity of the deceased at the time of the execution of the writing propounded, and then testify to personal transactions he has had with him as being a part of the basis of his opinion, when evidence of this character is properly so confined upon the trial by instructions or otherwise, the weight and credibility being for the jury to determine.

4. **Same—Declarations—Evidence.**

Where there is evidence upon the issue of *devisavit vel non* that the testator had long considered the disposition he desired to make of estate by will, had in fact made a will accordingly providing for certain of his near blood relations whom he held in affectionate regard when admittedly of sufficient mind, it may be shown in evidence upon the issue that in the writing propounded, made more recently before his death, he had left out of consideration these relations and given his entire property to his wife, for whom he had intended to provide to a less extent.

5. **Same—Mental Incapacity.**

Declarations of a deceased person, admittedly made when he was of sound mind and disposing memory, showing a long cherished, settled and unvarying purpose with respect to the disposition of his property by will, are competent, in connection with other supporting evidence, upon the trial of an issue involving his mental capacity at a subsequent date not too remote from the time of the declaration, in which he executed a will in utter variance with such purpose, which is contested upon the ground of mental incapacity.

6. **Same—Inferences.**

Upon the issue of *devisavit vel non* upon the caveat to a will, evidence that the testator should have been aware of his possession of a large estate and was under the erroneous impression at the time he made the will in question, that he was almost without the means of support, is competent upon the question of his mental capacity to have made it, involved in the issue of *devisavit vel non*.

7. Wills—Mental Capacity.

A person is in law deemed to have sufficient mental capacity to make a will when he has a clear understanding of the nature and extent of his act, the kind and value of the property devised, the persons who are the natural objects of his bounty, and the manner in which he desires to dispose of it.

8. Wills—Caveat—Judges Superior Court—Witnesses—Appeal and Error.

Where during the trial upon the issue of *devisavit vel non* it is made to appear to the trial judge that the testimony of a judge holding the courts of another district is of sufficient importance, it is not error for him, in the absence of the jury, to telegraph this witness, not subject to subpœna, requesting him to arrange his court so as to attend as a witness.

9. Courts — Discretion — Opening and Concluding Speech — Appeal and Error—Wills—Caveat.

Upon the trial of an issue *devisavit vel non,* where the evidence is conflicting, the decisions of the trial judge as to whether the propounders or caveators to a will shall open and conclude, is one within his discretion, and is not reviewable on appeal.

BROGDEN, J., dissenting; CLARKSON, J., concurring in dissent.

APPEAL by propounder from *Daniels, J.,* at May Term, 1927, of BEAUFORT. No error.

Proceeding for probate of paper-writing, propounded as the last will and testament of George H. Brown, deceased.

The issue submitted to and answered by the jury was as follows: "Is the paper-writing, dated 5 January, 1926, propounded for probate, and every part thereof, the last will and testament of George H. Brown?" Answer: No.

From judgment on the verdict, propounder appealed to the Supreme Court.

P. W. McMullan, J. C. B. Ehringhaus, Harry McMullan and Manning & Manning for propounder.

Ward & Grimes, H. C. Carter, John H. Bonner and Stephen C. Bragaw for caveators.

CONNOR, J. George H. Brown died at his home in the town of Washington, Beaufort County, N. C., on 16 March, 1926. He was born in said town on 3 May, 1850. He was therefore in his seventy-seventh year at the date of his death.

From 1872, when he was duly licensed to practice as an attorney and counsellor at law in this State, until 1889, when he was appointed judge of the Superior Court for the First Judicial District, he was actively and continuously engaged in the practice of his profession. From 1889 to 1905 he served continuously as a judge of the Superior Court. On

1 January, 1905, having been elected to that office at the preceding general election, he began his service as an Associate Justice of the Supreme Court. This service continued for two terms, and ended in 1920, at the expiration of his second term. He did not seek nomination or election for another term. Being then in his seventieth year, he retired from active and continuous work in his profession or otherwise. In 1921 he qualified as a Special or Emergency Judge of the Superior Court, in accordance with the provisions of chapter 125, Public Laws 1921, and thereafter, from time to time, he presided at terms of the Superior Court in various counties of the State, under assignments by the Governor. The last term to which he was assigned, and at which he presided, was the November Term, 1925, of the Superior Court of Beaufort, his native county. During all these years he resided at and made his home in the town of Washington.

An estimate of Judge Brown as a man and as a citizen, and an appreciation of his services to the State, both as a judge of the Superior Court for fifteen years, and as an Associate Justice of the Supreme Court for sixteen years, may be found in the address delivered by the Hon. Robert W. Winston, upon the presentation of his portrait to this Court on 12 April, 1927. See 193 N. C., 859. This portrait was presented to the Court by Mrs. Brown. It hangs in its appropriate place upon the walls of the Chamber in which this Court now sits. In the words of the *Chief Justice,* in his remarks accepting this portrait, Judge Brown has "left for our keeping a record of high service to his State, and a heritage of great worth to his fellowmen."

At his death Judge Brown left surviving, as his widow, Mrs. Laura E. Brown, to whom he was married at Washington, N. C., on 17 December, 1874. They lived together in the intimate relationship of husband and wife for more than fifty years. She is the propounder of the paper-writing offered for probate as his last will and testament, which is dated 5 January, 1926. No children were born of their marriage. His heirs at law are his two surviving sisters, and his nephews and nieces, the children of his two deceased sisters. He was the only brother of these sisters. These heirs at law are the caveators in this proceeding.

The issue which is determinative of this proceeding was submitted to and answered by a jury of Beaufort County, upon evidence consisting chiefly of testimony of relatives and friends, who had known Judge Brown for many years, both while he was strong and vigorous and after sickness and the infirmities of age had rendered him weak and feeble. There was sharp conflict in the opinions testified to by the witnesses at the trial as to the fact involved in the issue, to wit: Judge Brown's mental capacity on 5 January, 1926. Many were of the opinion that Judge Brown was not of sound mind and memory on said date; many were of opinion to the contrary. The credibility and probative force of all the evidence, including the conflicting opinions of the witnesses as to his mental capacity on 5 January, 1926, were matters essentially for the jury. By their verdict, they have found that the paper-writing, dated 5 January, 1926, propounded for probate, is not the last will and testament of George H. Brown. From the judgment upon the verdict the propounder has appealed to this Court, assigning as errors of the law in the trial of the issue (1) the admission of testimony as evidence over her objection; (2) the instructions of the court to the jury, to which she duly excepted; (3) the rulings of the court as to the conduct of the trial to which she excepted; and (4) the refusal of her motion that the verdict be set aside and a new trial ordered. These assignments of error are duly presented to this Court by propounder's appeal from the judgment. The jurisdiction of this Court conferred by section 8 of Article IV of the Constitution of North Carolina is confined to a consideration of assignments of error in matters of law and legal inference in order that it may be determined whether or not they shall be sustained. *In re Will of Creecy,* 190 N. C., 301.

The evidence tends to show the formal execution of the paper-writing dated 5 January, 1926, by Judge Brown, as his last will and testament. The paper-writing is in form sufficient to constitute a will, bequeathing and devising all his property, real and personal, to his wife, Mrs. Laura E. Brown, "to be hers absolutely in fee simple, including my residence and law office on Market Street, in Washington, North Carolina." Mrs. Brown is appointed executrix to the will. She is the sole devisee and legatee, by the terms of the will, of all the estate of Judge Brown, both real and personal. No reference is made in this paper-writing to his sisters, or to his nephews or nieces.

The uncontradicted testimony of witnesses tends to show that all the requirements of the statute, C. S., 4131, with respect to the execution of said paper-writing, both as a holograph and as an attested will, were complied with. Three witnesses whose credibility or competency is not questioned, testified that the paper-writing and every part thereof is in the handwriting of Judge Brown, whose name is subscribed thereto; there was evidence that the paper-writing was found, after the death of Judge Brown, among his valuable papers and effects in his safety-deposit box in the vault of the Bank of Washington, where it was deposited by Judge Brown on 5 January, 1926. There was evidence also that said paper-writing was written by Judge Brown in his lifetime, and signed by him, and that same was subscribed by two witnesses in his presence, and at his request, no one of whom is interested in the devise or bequest of any property by the said paper-writing.

The court charged the jury that the evidence, if believed by them, established the formal execution of the paper-writing by Judge Brown, as his last will and testament, and that said paper-writing, if so executed by him, is his valid will, unless they should find from the evidence, the burden being on the caveators in that respect, that at the time of its execution Judge Brown did not have the mental capacity which the law requires for the execution of a will. There was no contention, and no evidence tending to show that the execution of the paper-writing as a will, was procured by undue influence. The sole contention of the caveators, with respect to the validity of the paper-writing as a will, is that Judge Brown, at the time of its execution by him, on 5 January, 1926, and continuously thereafter until his death on 16 March, 1926, did not have the capacity to make and execute a will, for that he was not of sound mind and disposing memory at and during said time.

In support of their contention, caveators offered evidence tending to show that prior to 1919, when he was serving his second term as an Associate Justice of the Supreme Court, Judge Brown was strong and vigorous, in body and in mind; that in the spring of 1919 Judge Brown became ill, and that in consequence of such illness he spent some time as a patient in hospitals and sanatoriums; that during this illness he was greatly depressed in spirit and suffered from extreme melancholia, often expressing fear that he would find himself entirely without means for the support of himself and wife, and that he would become a pauper; that he was greatly concerned about his health, frequently expressing apprehension that he would not be able to return to his work on the Supreme Court, with the result that he would be deprived of his salary as an Associate Justice, making it difficult for him to live; that during this illness his mind was unsound and his memory bad. There is evidence that at this time Judge Brown was possessed of a large estate, yielding an income greatly in excess of his salary.

The evidence further tends to show that Judge Brown recovered from this illness, both physically and mentally, and returned to his work on the Supreme Court; he resumed this work and continued to perform his duties as an Associate Justice until his retirement at the end of his second term in 1920. After his retirement from the Supreme Court Judge Brown spent the larger part of his time at his home in Washington in daily association with his wife, his relatives and friends. His physical health was good, and there is no evidence that he was at any time during these years depressed in spirit or in mind.

There is no evidence tending to show that Judge Brown suffered any further illness until the spring of 1925. He presided as Special or Emergency Judge at the March Term, 1925, of the Superior Court of Henderson County, which was a two-weeks term. He became sick during the second week of the term and adjourned court on Wednesday. There was evidence that as a result of this sickness his mind became confused; he was unable to remember persons with whom he had had close associations, both official and social, during the court. Witnesses who saw him during this term of court testified that in their opinion he did not, after he became sick, have mental capacity sufficient to enable him to know what property he had, who his relatives were or what claims they had upon him by reason of their relationship to him. A witness who had known Judge Brown for many years at Washington, and who was then living in Hendersonville, testified that Judge Brown was not himself at all while he was in Hendersonville.

After Judge Brown's return from Hendersonville to Washington he was quite sick for some time. During the early summer of 1925 he went with Mrs. Brown to Beaufort, N. C., to recuperate from this illness. He and Mrs. Brown remained at Beaufort for several weeks. He was much improved upon his return to Washington during the latter days of June. In August, 1925, he went to Asheville, N. C., as had been his custom for many years. He was accompanied by Mrs. Brown, who remained with him until early in October, when they returned to their home in Washington. While in Asheville Judge Brown had trouble with his eyes and consulted an oculist. This trouble impaired his sight and he was much depressed by his inability to read as he had been accustomed to do. Mrs. Brown testified that his inability to read was a great deprivation to him. From his return to Washington about October, 1925, to his death in March, 1926, Judge Brown remained at his home. There is no evidence that he undertook any work thereafter except during the November Term of the Superior Court of Beaufort County.

There was evidence tending to show that after his return to Washington there was a marked change in Judge Brown's physical appearance. He became weak and feeble, so much so that when he went out on the streets of Washington, either for social or business purposes, he was usually accompanied by Mrs. Brown. His condition, both physical and mental, during the fall of 1925, was the subject of much sympathetic comment by relatives and friends, who had known him for many years. The contrast in both respects in his condition at this time and his condition in former years was marked. Apprehension was felt and expressed by Mrs. Brown and others that he would not be able to preside at the November Term, 1925, of the Superior Court of Beaufort County, in accordance with the assignment of the Governor. Many witnesses at the trial who saw him while presiding at this time, testified that in their opinion Judge Brown was not only sick in body, at that time, but also of unsound mind and memory. These opinions were formed from personal observation and contrasts made by the witnesses in his appearance and conduct at this time and at former times, when he was both strong in body and vigorous in mind. There were many other witnesses offered by the propounder who testified that while Judge Brown was at the time weak and feeble, his mental faculties had not become impaired. The facts which formed the basis of these conflicting opinions are not in serious controversy; the witnesses differed only in their inferences and conclusions as to Judge Brown's mental condition, and in some instances as to the cause of unusual conduct which they observed.

There was evidence tending to show that Judge Brown was sick during the early days of January, 1926. At this time, on several occasions, Judge Brown expressed apprehension that the General Assembly, which he insisted was then in session, although in fact the General Assembly did not meet during 1926, might repeal the statute under which he was receiving his salary as Special or Emergency Judge; he stated to relatives and friends, repeatedly, that if this was done, he would have no income, as he was dependent upon his salary for his support. The evidence shows that at this time the income from investments made and owned by Judge Brown exceeded $20,000 per annum, and that he was in daily correspondence with banks in which his securities were deposited for safe-keeping. This correspondence shows that Judge Brown was fully advised from time to time as to the total value of his securities, and as to the income from the same.

A few weeks after the execution of the paper-writing by him, Judge Brown became so ill that he was taken to a hospital in Washington. He remained there for several days and was then taken to his home where he remained to the date of his death. His mental condition during this sickness was bad. He was sick continuously until his death, and frequently expressed fear that he would die a pauper. This fear made him very unhappy. The assurances of his relatives and friends that his fear was groundless gave him no relief.

Judge Brown was the only son of his parents, both of whom died when he was a young man. He had four sisters, two of whom are dead: Both left children, who survived Judge Brown. A son of one of the deceased sisters, a nephew of Judge Brown, lives in Washington. He went there from his home elsewhere in the State soon after receiving his license to practice law, at the suggestion and upon the advice of Judge Brown, who had observed with pride and satisfaction his successful career at Washington in his profession. This nephew is married and has several daughters. All the evidence is to the effect that the relations between Judge Brown and this nephew, his wife and daughters, especially after his retirement from office as an Associate

Justice of the Supreme Court in 1920, had been close and affectionate. There was no evidence of any change in their relations at any time prior to 5 January, 1926, or thereafter. There is evidence that on this day, when the paper-writing was executed by Judge Brown, he sent for and consulted this nephew, at his home, about a matter in which he was greatly interested, to wit, the repeal by the General Assembly of the statute under which he was receiving his salary as a Special or Emergency Judge. After Judge Brown's death Mrs. Brown sought the aid and advice of this nephew. None of Judge Brown's other relatives, who are now his heirs at law, lived in Washington. There is evidence, however, tending to show that prior to 5 January, 1926, his relations with them were pleasant and normal. There is no evidence of any change in these relations at any time prior to his death. He had on many occasions manifested for them strong affection, and recognized their claims upon him by reason of their relationship. As late as about 1 October, 1925, in a conversation with Governor McLean, in Raleigh, while on his return trip from Asheville to Washington, Judge Brown said: "I am getting old; my health is bad; I cannot expect to live much longer. I have no children of my own. In recent years, particularly since I have returned to Washington to live, I have become very much attached to Angus' wife and daughters. They have been very kind to me, and while I feel an interest in all my nephews and nieces and their families, I feel a peculiar interest in them. I have made my will, and in my will I have provided especially for Angus' wife and children. I will leave a very nice estate, and with what I have arranged to give them, Angus' daughters will be taken care of handsomely." In this conversation Judge Brown expressed his affection for another nephew and his wife, Mr. and Mrs. Brown Shepherd, saying that although they were well fixed financially, he had provided for them also. This conversation occurred during an interview between Judge Brown and Governor McLean, relative to a matter of great importance to Mr. Angus D. McLean, Judge Brown's nephew, and Governor McLean's cousin. The statements by Judge Brown in reference to his will, and to his nephew's interest in the disposition of his estate, were made in support of his insistent advice upon this matter.

There was evidence tending to show that as long before his death as February, 1924, when he was in his seventy-fifth year, and after he had retired from active professional and business life, Judge Brown was giving careful consideration to the making of his will. This is shown by his correspondence with Mr. Joseph G. Brown and Mr. Reid Martin, bankers, residing at Raleigh, N. C. Mr. Brown was president of the Citizens National Bank and of the Raleigh Savings Bank and Trust

Company. Mr. Martin was cashier of the latter. Judge Brown had accounts with both banks and had securities deposited with each for safe-keeping.

In a letter dated at Washington, N. C., on 26 April, 1924, addressed to Mr. Martin, Judge Brown wrote as follows: "You are a friend indeed, and I am very grateful to you for your many kindnesses to me. I sincerely hope you and J. G. B. will outlive my wife and myself. I hope you will bear in mind, in case anything happens to me, that I have made a new will this week, and it is in Box 40, Bank of Washington. I have one key, and my old clerk here, Arthur Mayo, has the other key. I have devised all my personal estate to Raleigh Savings Bank and Trust Company in trust and appointed that company the sole executor. If you ever hear of my death, you can come down and get the will and probate it here, and qualify as executor for the company. In the will is a little memento of my personal regard for you and J. G. Brown."

In a letter dated at Washington, N. C., on 27 April, 1924, addressed to Mr. Jos. G. Brown, Judge Brown wrote as follows: "I have written my will and filed it in Lock Box 40, Bank of Washington. My entire personal estate is devised to Raleigh Savings Bank and Trust Company in trust to pay entire net income to my wife during her life, except a small annuity to a faithful old servant. After my wife's death, it is to be divided equally between my nephews and nieces; so you see there will not be much trouble in administration. There is a little memento of my personal regard for you and also for Reid Martin. The one P. C. is likely to pan out more than the suggested $3,000, and the three P. C. on annual income of the estate is likely to pay the trustee very well for the trouble of collecting it. In case you hear of my death you will send down and get the will and probate it here. There are a lot of securities in that box and also with W. H. Goadby & Co., New York. I hope you will survive both Mrs. Brown and myself. I am very grateful to you for your great kindness."

In a letter dated at Asheville, N. C., on 5 August, 1924, addressed to Angus D. McLean, Judge Brown wrote as follows: "I intended to talk to you about the subject I am writing about before I left home. . . . It is about my will. I am writing as you and your wife and daughters are largely interested in its present provisions. . . . My will is a holograph, in my deposit box in the Bank of Washington. My handwriting can be easily proven. I give my wife our home place and contents in fee. After an annuity to Pauline, I bequeath my entire personal estate to the Raleigh Savings Bank and Trust Company as trustee to handle same, and pay entire income to my wife during her life. I also give her the power to make a will and dispose of as much as fifty thousand of my estate in any way she may wish. After her death I bequeath a substantial legacy to said trustee for each of your daughters to be kept at compound interest and paid over as each daughter arrives at 21 years of age. If any die before then, her legacy to be divided among the surviving sisters. I also give your wife a nice legacy in token of my sincere love for her. The residuum of my estate is to be divided per capita among my nephews and nieces. The share going to Brown Shepherd and Eleanor C. Whitney to be retained until death of their respective mothers, and income paid to the mothers during their lives. I have tried to be fair to all my relatives, but as your lovely girls, whom I dearly love, are not my nieces, but my great nieces, I have given them specific legacies. My wife has been dealt with so liberally that I am sure she will not dissent, but if she does, your girls and Nettie will get their legacies anyway."

In a letter written at Washington, N. C., dated 24 March, 1925, addressed to Joseph G. Brown at Raleigh, N. C., Judge Brown made this reference to his will: "As you know, I have left my somewhat large estate to the Raleigh Savings Bank and Trust Company because of my profound confidence in you particularly, and I will also say, because of my confidence in Martin."

There are references to this will in letters written by Judge Brown, subsequently, to Mr. Martin dated 25 April, 1925, and to Mr. Brown, dated 3 July, 1925; also in letter written at Asheville, dated 3 September, 1925, addressed to Angus D. McLean, at Washington, N. C. In this last letter Judge Brown advises strongly that Mr. McLean do not consider a suggestion as to a change of residence, and as one reason for his advice says: "Besides as you know, my will devises a very substantial part of my estate to your wife and daughters. I can hardly endure the thought of all of you leaving Washington."

The evidence shows that as late as 1 October, 1925, Judge Brown in his interview with Governor McLean referred to his will, previously executed by him, in which he had bequeathed and devised his estate, after the death of Mrs. Brown, to his nephews and nieces, with provisions for his surviving sisters. There is no evidence showing or tending to show any change thereafter in his relations to his nephews and nieces, or to his sisters, or any change in the condition or value of his estate. There is evidence of a marked decline in Judge Brown's physical condition, after his return to Washington, and during the fall and winter of 1925. Rev. S. A. Cotton, presiding elder of the Weldon District of the North Carolina Conference of the Methodist Church, who had known Judge Brown for many years, testified as follows: "I had known Judge Brown prior to the fall of 1925. I had been impressed with his mental and physical stamina; he was a strong man, mentally. In the fall of 1925—during October and November—I noticed a difference in Judge Brown. I was impressed with a marked change in his mental condition; the change was for the worse. I was impressed that Judge Brown was losing his grip, mentally, to put it that way. I got that impression from observation and from conversations with him."

There is evidence that the marked decline in physical strength and mental vigor was accompanied by great mental depression, manifesting itself chiefly in loss of memory and inability to realize at times that he was possessed of an estate, of large value, yielding an annual income exceeding $20,000. In a postscript to a letter, dated 25 December, 1925, addressed to Mr. J. G. Brown, Judge Brown says: "As I seem to be at present physically and mentally incapable of properly managing my business affairs, I wish to say that I would regard it as a great favor if I could induce you to take charge of them for me, as I have the utmost confidence in your absolute integrity and business ability." On 2 January, 1926, in a letter to his nephew, Mr. Brown Shepherd, at Raleigh, speaking of his great need of money, he says: "I am not drawing any salary." At this time he was receiving monthly his salary as a Special or Emergency Judge.

On or shortly before 5 January, 1926, Judge Brown, with his own hand, wrote the paper-writing now offered for probate as his last will and testament. He therein gives, bequeaths and devises to his wife all his estate, making no reference therein to his nephews or nieces, or to his sisters. The only property specifically referred to in this paper-writing is his residence and law office, shown by the evidence to be worth about $15,000 and $5,000, respectively. No reference is made therein to the stocks, bonds and securities which he then owned, and which exceeded in value $500,000. These stocks, bonds and securities were then on deposit for safe-keeping with the Citizens National Bank of Raleigh, the Raleigh Savings Bank and Trust Company, the Bank of Washington and W. H. Goadby & Co., bankers, New York City. Judge Brown's correspondence shows that he was informed as to these stocks, bonds and securities, and that his repeated requests for itemized statements from each of the depositaries had been promptly complied with.

Mr. A. D. McLean, nephew of Judge Brown, and one of the caveators, testified that he saw Judge Brown at his home, on the morning of 5 January, 1926. At that time Judge Brown knew him and knew Mrs. Brown; he knew he had a house and lot, and an office in Washington; in the opinion of the witness, this is all that he knew about his property. He further testified that in his opinion Judge Brown on this day did not know what property he owned; that he did not have sufficient capacity, if he remembered his relatives, to recall his feelings toward them, or to recall the fact of his relation to them; he did not then have sufficient capacity to understand the scope and effect of a will.

The witness further testified that he had formed this opinion by contrasting Judge Brown's condition, physical and mental, on that day, with his condition in former years, when he regarded Judge Brown as one of the ablest lawyers and business men that he had known. The witness gave in detail the results of his observation of Judge Brown from 1919, when he first became ill, to his last illness, immediately preceding his death. He testified that in August, 1924, he received through the mail, at Washington, a letter dated at Asheville, N. C., on 5 August, 1924. The letter is in Judge Brown's handwriting, and is addressed to the witness. In the opinion of the witness, Judge Brown was at that time of sound mind and memory. The witness' opinion that Judge Brown was of unsound mind on 5 January, 1926, was based, in part, by contrasting his purposes and intentions with respect to the disposition of his property at his death, as expressed in this letter, written when Judge Brown was sound in mind, with the disposition made in the paper-writing dated 5 January, 1926, when it is contended he was of unsound mind.

To the introduction of this letter in evidence by the caveators, the propounder objected. The objection was overruled, and the jury was instructed by the court that the letter was admitted in evidence, to be considered by them in connection with other testimony of Mr. McLean, as showing the basis of his opinion with respect to Judge Brown's mental condition on 5 January, 1926. Propounder excepted to the admission of this letter and to the instruction of the court with respect to its consideration by the jury.

Mr. McLean further testified to a conversation with Judge Brown, in his office at Washington, in July, 1925, upon Judge Brown's return from Beaufort. Propounder's objection to this testimony was overruled; the jury was instructed that it was admitted for the same purpose and under the same limitation as the letter. The witness testified that his opinion as to Judge Brown's mental condition was formed in part by contrasting what Judge Brown then said to him relative to his intention with respect to his property, with the disposition made in the paper-writing propounded as his will.

In this State a proceeding for the probate of a paper-writing as a will is not regarded as an adversary suit *inter partes,* but as a proceeding *in rem. Edwards v. White,* 180 N. C., 55, citing and approving *Powell v. Watkins,* 172 N. C., 244. There are no parties to such a proceeding, certainly none who can withdraw or take a nonsuit, and thus put the matter where it was at the start. *Collins v. Collins,* 125

N. C., 98. When the probate of a paper-writing as a will is contested, it is the duty of the court to cause an issue of *devisavit vel non* to be submitted to a jury. Strictly speaking, there are no parties to such an issue; both propounders and caveators are equally actors, in obedience to the order of the court directing the submission of the issue. *Enloe v. Sherrill,* 28 N. C., 213. In the opinion of the Court, *In re Bowling,* 150 N. C., 507, it is suggested that in view of the fact that there are no parties, in the usual sense of the term, the proceeding should be entitled, "In re the Will of ...." This suggestion has been generally adopted, as in this proceeding.

It has been consistently held by this Court, however, that in a proceeding for the probate of a will, both propounders and caveators are parties within the meaning and spirit of C. S., 1795, which disqualifies a party or person interested in the event from testifying as a witness in his own behalf against the executor, administrator or survivor of a deceased person, concerning a personal transaction or communication between the witness and the deceased, except where the executor, administrator or survivor is examined in his own behalf, or where the testimony of the deceased person is given in evidence concerning the same transaction or communication. *In re Mann,* 192 N. C., 248; *In re Chisman,* 175 N. C., 420; *In re Harrison,* 183 N. C., 457; *Pepper v. Broughton,* 80 N. C., 251.

Notwithstanding this principle, Judge Brown's letters to Mr. A. D. McLean, one of the caveators who had testified that in his opinion Judge Brown was not of sound mind on 5 January, 1926, and the conversations between Mr. McLean and Judge Brown, as testified to by the former, were properly admitted in evidence upon the principle stated in *McLeary v. Norment,* 84 N. C., 237, and approved in many opinions subsequently delivered by this Court. *In re Hinton,* 180 N. C., 207; *Bissett v. Bailey,* 176 N. C., 43; *In re Chisman,* 175 N. C., 420; *Rakestraw v. Pratt,* 160 N. C., 437. This is true with respect to the letters even if it be held that they are personal communications or transactions between Judge Brown and Mr. McLean. All these letters were admittedly in Judge Brown's handwriting or signed by him; they were all received by Mr. McLean through the mail. It might well be held that the testimony of Mr. McLean with respect to the receipt by him of the letters, through the mail was not as to personal transactions with Judge Brown. *McEwan v. Brown,* 176 N. C., 249, and cases there cited.

It has been generally held that declarations, oral or written, by the deceased may be shown in evidence upon the trial of an issue involving his mental capacity, whether such declarations were made before, at or after the date on which it is contended that the deceased was of unsound mind. *In re Burns' Will,* 121 N. C., 337. It has also been held that a witness who has had opportunity to observe the deceased, may give in evidence his opinion as to his mental capacity. *Clary v. Clary,* 24 N. C., 78. Either a propounder or a caveator may testify as to his opinion upon this question. It was held in *McLeary v. Norment, supra,* that where a witness had testified to a want of mental capacity in the grantor to make a deed, and that his opinion was formed from conversations and communications between the witness and the deceased, it is competent to prove the facts upon which the opinion was formed. Hence, the witness may testify to his conversations and communications with the deceased, when such conversations and communications are in part the basis of his opinion, in order that the jury may determine what weight his opinion, based on these conversations and communications, is entitled to in their consideration of the opinion as evidence. A caveator, although a party to the proceeding, and interested in its event, may give in evidence his opinion as to the mental capacity of the deceased, based upon conversations or communications with him. Having done so, it is competent for him to testify as to the conversations and communications. The learned trial judge was careful to observe this principle and to instruct the jury accordingly. Assignments of error based upon exceptions to the admission of evidence, and to the instructions of the court, with respect to the consideration of certain evidence admitted cannot be sustained. It must be assumed that the jury, in considering Mr. McLean's testimony with respect to his personal transactions and communications with Judge Brown, were mindful of the court's instructions. There was other evidence, unobjected to, tending to show Judge Brown's intentions with respect to the disposition of his property, when he was admittedly of sound mind and disposing memory.

We have read the entire charge of the learned judge who presided at the trial of the issue submitted to the jury in this proceeding. It is set out in full in the statement of the case on appeal. The contentions of both propounder and caveators as to the facts which each contends the jury should have found from the evidence, and as to the law applicable to these facts, are stated therein, fully and fairly. With respect to the principles of law involved in the issue, the instructions given to the jury are in many instances in the identical language used by this Court in opinions in which these principles are stated and discussed. All the instructions are in full accord with well-settled principles, and are fully supported by authoritative decisions of this Court. We find no confusion or inconsistency in the statements of the law or in the instructions with respect thereto, as contended in the brief filed in this Court in behalf of the propounder. Assignments of error based upon exceptions to instructions to the jury, or upon exceptions to the failure to give instructions requested by propounder, are not sustained. There is no error in either respect.

There is no error in the instruction to the jury to the effect that in considering the question of testamentary capacity involved in the issue, the jury should consider the evidence tending to show that when Judge Brown was admittedly of sound mind and disposing memory, he had expressed intentions with respect to the disposition of his property and estate by will, which he then stated he had theretofore executed, utterly at variance with the disposition made in the paper-writing offered for probate, dated 5 January, 1926, when, it is contended, he was not of sound mind and disposing memory, and that if they should so find the facts to be, such variance, although not alone sufficient to prove incapacity to make a will, was a fact or circumstance to be considered by the jury in determining whether or not Judge Brown had mental capacity to dispose of his property and estate on 5 January, 1926. Declarations of a deceased person, made when he was of sound mind and disposing memory, showing a long-cherished, settled and unvarying purpose with respect to the disposition of his property by will, are competent as evidence upon the trial of an issue involving his mental capacity at a subsequent date, not too remote from the time of the declarations, on which he executed a will, in utter variance with such purpose, which is contested upon the ground that there was a want of testamentary capacity.

The record in this case, viewed in its entirety, does not present the bare question whether the contrast between two natural and reasonable acts or expressions, constitute evidence of insanity or of lack of testamentary capacity, simply because they are different in effect and are separated in point of time. That there is such a difference is merely a circumstance, which with other facts and circumstances appearing from all the evidence, may be considered by the jury in determining the question involved in the issue. In the absence of such other facts and circumstances, such difference alone would not be sufficient as evidence of insanity or lack of testamentary capacity at the date of the last act or expression.

There is no error in the instruction to the jury to the effect that in considering the question of testamentary capacity involved in the issue, the jury should consider the evidence tending to show that Judge Brown's estate, on 5 January, 1926, consisted of his residence, and his office, worth about $15,000 and $5,000, respectively, and of stocks, bonds and securities, exceeding in value $500,000, yielding a net income of more than $20,000 per annum, and that while the extent, character and value of his property is not alone determinative of the question of testamentary capacity, such extent, character and value may properly be considered in determining whether or not Judge Brown was of sound mind and disposing memory when he wrote and signed the paper-writing dated 5 January, 1926. *In re Staub's Will,* 172 N. C., 138, this Court approved the following definition of testamentary capacity: "A person has testamentary capacity within the meaning of the law, if he has a clear understanding of the nature and extent of his act, of the kind and value of the property devised, of the persons who are the natural objects of his bounty, and of the manner in which he desires to dispose of the property to be distributed." See *In re Will of Creecy,* 190 N. C., 301, and cases therein cited. The converse of this statement must necessarily be the law.

Nor is there error in the instruction to the jury to the effect that in considering the question of testamentary capacity involved in the issue, the jury should consider the fact that by the paper-writing offered for probate, dated 5 January, 1926, Judge Brown bequeathed and devised all of his property, real and personal, to his wife, absolutely and in fee simple, and that his sisters, and nephews and nieces, who are his heirs at law, and the natural objects of his bounty, by reason of ties of blood and affection, take no part of said property or estate. There was no error in this instruction, especially in view of the evidence tending to show declarations of Judge Brown, made when he was admittedly of sound mind and disposing memory, that in recognition of his relations to his sisters, and nephews and nieces, he had provided by his will for them, out of his "somewhat large estate."

The question as to whether Judge Brown was sane or insane, on 5 January, 1926, when he executed the paper-writing propounded as his will, is not necessarily involved in or determinative of the issue submitted to the jury. The question is, whether or not he had testamentary capacity. It is not required that a caveator shall prove that the deceased was insane in order to establish a want of testamentary capacity. The trend of judicial opinion on this subject shows clearly that a distinction should be and is made between insanity and want of testamentary capacity. A man may be lacking in testamentary capacity, as defined by the law, and yet not insane, certainly within the ordinary meaning of that term. The law requires that he shall be sound in mind, and of disposing memory in order to have capacity to make a will disposing of his property, at his death, otherwise than as the law directs in case of his intestacy with respect to the disposition of his property.

Propounder's assignment of error based upon her exception to the sending by the court of a telegram to Judge Grady, requesting his attendance at the trial as a witness for caveators, manifestly cannot be sustained. The telegram was written and sent from the courtroom in the absence of the jury. Counsel for caveators had stated to the court that they had learned since the trial began that Judge Grady was a material witness in their behalf. Judge Grady, who was then presiding in the Superior Court of Warren County, was not subject to subpœna as a witness. His deposition could not be taken during the trial, without the consent of propounder. This was refused. His Honor felt justified, in view of these facts, in requesting Judge Grady to leave his court and attend the trial in order that the jury might have his testimony upon the trial of the issue. Propounder has no just cause of complaint with respect to this matter.

The ruling of the court that the caveators should open and conclude the argument to the jury is not subject to exception. This was a matter to be determined by the court in the exercise of its discretion. It was so held in *In re Peterson Will,* 136 N. C., 13. The fact that there had been no probate of the will in common form cannot affect the discretion of the court with respect to this matter. The trial of the issue *devisavit vel non,* in a proceeding for probate in solemn form, is *de novo.*

The record upon this appeal contains 752 printed pages. There are 121 assignments of error, based upon exceptions duly noted. Full and exhaustive briefs have been filed in this Court by learned and diligent counsel. Each of the assignments of error has had our full and careful consideration. Manifestly, they cannot be set out and discussed in detail in this opinion.

We have found no error in the trial of the issue in matters of law or legal inference. As was said by *Justice Clarkson,* speaking for the Court *In re Will of Creecy,* 190 N. C., 310, where there was an appeal by a propounder from a judgment on an adverse verdict: "The case was carefully tried in the court below, in accordance with the law. It is not our province to determine whether the verdict of the jury is just or unjust; that is a matter solely for the jury. Under our law, the jury are the triers of the facts and are presumed to be men of good moral character and of sufficient intelligence." There is no suggestion to the contrary in this record, with respect to the jurors, to whom the issue was submitted and by whom the verdict was rendered. The judgment is affirmed. There is

No error.

BROGDEN, J., dissenting: This case has been given earnest and careful consideration by the Court, and the opinion sets forth clearly the conclusion reached and the reasons supporting it. However, I cannot escape the conviction that there is vital error upon the record affecting not only the merits of this particular case, but involving also the method or standard by which testamentary capacity may be determined.

A brief survey of the facts is perhaps necessary to develop the proposition of law which I think was erroneously applied by the trial judge. On 5 August, 1924, the testator wrote to his nephew a letter in regard to a will. The pertinent part of this letter is as follows: "I give my wife our homeplace and contents complete. After an annuity to Pauline, I give my entire personal estate to the Raleigh Savings Bank and Trust Company, as trustee, to handle same and pay entire income to my wife during her life. I also give her the power to make a will and dispose of as much as fifty thousand of my estate in any way she may wish. After her death I bequeath a substantial legacy to said trustee for each of your daughters to be kept at compound interest and paid over as each daughter arrives at 21 years of age. If any die before then her legacy to be divided among the surviving sisters. I also give your wife a nice legacy in token of my sincere love for her. The residuum of my estate is to be divided per capita among my nephews and nieces. The share going to Brown Shepherd and Eleanor C. Whitney to be retained until death of their respective mothers and income paid to the mothers during their lives. I have tried to be fair to all my relatives, but as your lovely girls, whom I dearly love, are not my nieces, but great nieces, I have given them specific legacies. My wife has been dealt with so very liberally that I am sure she will not dissent, but if she does, your girls and Nettie will get their legacies anyway." At the time this letter was written the testator was admittedly sane. On the 5th day of January, 1926, the testator executed a new will bequeathing and devising all of his real and personal property to his wife. This paper-writing is the subject of the controversy.

The trial judge permitted the letter of 5 August to be offered in evidence and read to the jury. The witness, Mr. A. D. McLean, had previously testified that in his opinion the testator did not have sufficient testamentary capacity on 5 January, 1926. When the letter of 5 August was offered in evidence the propounder objected. The witness was asked this question: "Do you base your opinion of his mental condition on 5 January, 1926, in whole or in part on that letter?" The witness answered, "No. I will say so as to be understood: *I know from this letter* and from other sources that on 5 January, 1926, in my opinion the will does not represent what Judge Brown intended. My opinion of his condition on 5 January, 1926, *is in part based on this letter,* . . . but it is not the only basis of my opinion. *It is a part of the basis for my opinion,* . . . *but the letter enters into my opinion and forms part of the basis of that opinion* in connection with other facts. *I know from the letter* and otherwise what Judge Brown intended to do with his estate." The record shows this entry: "The court admits the letter in evidence in support of or as a basis to Mr.

McLean's opinion, in connection with other circumstances as to the mental capacity of Judge Brown." The record further shows this entry: "The letter is read. The jury is instructed by the court that this letter is offered in evidence in connection with other testimony of Mr. McLean with reference to the grounds upon which he forms the opinion of the mental condition of Judge Brown, and that the jury will consider it for no other purpose." It further appears that the witness, McLean, was permitted to testify as to a conversation with the testator in July, 1925. The propounder objected. The record shows this entry: "Propounder objects to all of this line of testimony, and asks for a preliminary examination. The court rules that it may be had in cross-examination and admits this testimony in the same way and *for the same purpose for which the letter was admitted,* witness having stated to the court that the conversations with Judge Brown *and the letter received from him form a part of the basis for his opinion that Judge Brown was mentally incompetent on 5 January, 1926, as stated.*"

Thereafter the trial judge arrayed the contentions of the caveators with respect to the alleged will referred to in the letter of 5 August, 1924, and charged the jury as follows: "The court charges you, upon these contentions, that it is the right and duty of the jury to consider them and to *contrast the two alleged wills as bearing upon the issue of mental capacity* and the testamentary disposition which Judge Brown made or intended to make of his property." Again the trial judge charged: "The court charges you that a desire on the part of Judge Brown, if you find from the evidence it existed, that the bulk of his estate should ultimately go to his own people, namely, his nieces and nephews, was not unnatural or unreasonable, but both natural and proper, if in accordance with his wishes, and if you find from the evidence by its greater weight, that the desire to avoid dissent by his wife existed on his part, that he intended the bulk of his estate to go to his own people, but wished it during her lifetime and for her and their benefit and protection to be administered by said Bank and Trust Company, as trustee or executor, the same should be considered by the jury as bearing upon the issue of mental capacity on 5 January, 1926, when the alleged last will was made."

It is apparent from the portions of the record quoted that the letter lies at the heart of this case. The caveators took the position that the letter showed a totally different testamentary intention from that expressed in the last will of the testator, and it was used throughout the trial as one of the standards of testamentary capacity by which to measure the validity of the will of 5 January, 1926. If the introduction of this letter was error, it was therefore grievous and disastrous so far as the propounder was concerned.

As pointed out in the opinion of the Court, it is undoubtedly established law in this State that a nonexpert witness may give in evidence his opinion as to the mental capacity of a testator, and where this opinion has been formed from declarations or communications between the witness and the deceased, it is competent to offer in evidence the facts constituting the basis of the opinion. The Court declares the law as follows: "It has been generally held that declarations, oral or written, by the deceased may be shown in evidence upon the trial of an issue involving his mental capacity, whether such declarations were made before, at or after the date on which it is contended that the deceased was of unsound mind." The witness testified that the letter of 5 August, 1924, constituted "a part of the basis" of his opinion as to the mental incapacity of the testator on 5 January, 1926. The court admitted it, and stated to the jury that it was admitted because it constituted a part of the ground of the opinion of mental incapacity entertained by the witness. Now the declaration of 5 August, 1924, upon its face, was the perfectly sane declaration of a perfectly sane man. Can a sane declaration of a sane man be evidence of insanity? Can life be evidence of death? Can light be evidence of darkness? Can health be evidence of sickness? Can sanity be evidence of insanity? To my mind to ask these questions is to answer them in the negative. I conceive the law to be that the declarations of a testator made prior to the execution of a will, in controversy, are admissible in evidence upon the question of mental capacity, but such declarations must of themselves contain evidence of mental disorder or bear upon their faces the indelible stamp of mental impairment. I think, too, that the law of this State supports this contention. The two leading cases upon the subject of declarations are *McLeary v. Norment,* 84 N. C., 237, and *In re Burns' Will,* 121 N. C., 337. Both of these cases are relied upon in the opinion of the Court. In the *Norment case* the action was brought to set aside a deed made on 2 February, 1867, upon the ground of mental incapacity and undue influence. A witness, Harriet Alexander, was permitted to testify as to her opinion of her aunt's mental capacity to make a deed, stating that the grantor had been mentally incapable since a stroke of paralysis in 1859. The witness testified that her opinion was formed from conversations and communications between them. The witness was asked to give the basis of her opinion, and this testimony was excluded, and for the rejection thereof the Court granted a new trial. Therefore, it did not appear in that case that the declarations themselves bore evidences of mental disorder. However, the record in that case discloses that another witness testified that in 1865, prior to the making of said deed, the conversations of the grantor "were vague and meaningless. Her conversations were incoherent." Another witness testified that upon one occasion prior to the date of the deed, she was invited to the home of the grantor for dinner, and that the grantor spoke of carving the turkey when there was no turkey on the table to be carved. Thus, the original record in the *Norment case* discloses unmistakably that the declarations referred to were themselves messengers of legal incapacity.

In the *Burns' Will case* numerous witnesses were examined, who gave their opinion as to the insanity of the testator existing long before the date of the will. These opinions were based upon the "conduct and language of the testator at different times." An examination of the record in that case discloses that in all of these conversations and declarations the unmistakable element of a deranged mind was present. For instance, a witness testified that the testator Burns talked "foolishly"; that he said the witches were after him, and he had put tar on his fence and gates to keep them off. The other cases, as a matter of fact, state the general proposition of law, with perhaps variant wording, as announced in the *Norment* and *Burns cases.*

I think, therefore, that the *Norment* and *Burns cases,* when read in the light of the facts contained in the original records, clearly establish the principle for which I contend. I apprehend that the confusion in the law is due to the fact that in the majority of the cases undue influence and mental incapacity were both involved. It may be that the fact that a testator made one will at one period and a later will at another period different from the first might be used as an intimation or inference of undue influence, but undue influence does not flow from a diseased mind, but from a perfectly normal mind, the current of which has been bent and diverted by overwhelming and dominating pressure from without. Hence, a declaration made at one time, showing a particular testamentary intent, and thereafter a will is made showing a totally different testamentary intent, might be considered as evidence, in cases of undue influence, tending to show the warping of the mind by the unlawful and fraudulent force applied from without. But I know of no case applying the principle solely to mental capacity.

The declaration contained in the letter of 5 August, 1924, was treated by the court as a will. If so, it was entirely sensible upon its face and the disposition of the estate to nieces and nephews was proper and natural and had the full sanction of the law. The will of 5 January, 1926, was also entirely sensible upon its face, and the disposition of the estate to the wife of the testator was proper and natural and had the full sanction of the law. *In re Peterson,* 136 N. C., 13.

The trial judge instructed the jury: "Contrast the two alleged wills as bearing upon the issue of mental capacity." In the first place, how can the contrasting of two wholly sensible documents, each having the equal sanction of the law, constitute any evidence of mental impairment or warrant any inference of a diseased mind? But there is a graver aspect. The word "contrast" used by the trial judge means to point out or observe differences. Now what is the fundamental difference between the two documents? Obviously, the devise of the bulk of the estate to nieces and nephews in the first will and the devise of the whole estate to the wife in the last. In short, the controlling difference was the fact that the wife received a small portion in the first and the entire estate in the second. So that, when the trial judge instructed the jury, in effect, that it was the duty of the jury to consider the difference between the two documents upon the question of testamentary capacity, it was clearly equivalent to charging that the fact that the testator gave his entire estate to his wife, thereby excluding his blood kin, was at least a circumstance tending to show mental incompetence. An examination of the method of arraying the contentions of the parties in this particular, I think, produces this conclusion as unerringly as the flight of a martin to his gourd or a bee to his hive.

The law, as I understand it, is to the contrary. For instance, in *Peterson's case, supra,* this Court said: "In the light of the experience and observation of men of the best judgment and soundest minds, we can see nothing in the fact that this man gave his estate, the produce of their joint industry and economy, to his wife, tending to show mental incapacity or undue influence."

It would serve no useful purpose to thresh over the authorities or to draw out the debate upon this case. I only intended a brief statement of my conviction that the case has not been tried in accordance with law and the reasons for such conviction.

CLARKSON, J., concurring in dissent: The majority opinion is written with care and thought commensurate with the importance of the controversy. In this jurisdiction there is an impenetrable wall between the law and the facts. The facts to be ascertained by the jury. This Court lays down, perhaps for all time, precedents in the law. The present case goes beyond what has ever before been decided by this Court.

In the main opinion is the following statement: "The record in this case, viewed in its entirety, does not present the bare question whether the contrast between two natural and reasonable acts or expressions, constitute evidence of insanity or of lack of testamentary capacity, simply because they are different in effect and are separate in point of time. That there is such a difference is merely a circumstance, which with other facts and circumstances appearing from all the evidence, may be considered by the jury in determining the question involved in the issue. In the absence of such other facts and circumstances, such difference alone would not be sufficient as evidence of insanity or lack of testamentary capacity at the date of the last act or expression."

This statement is the crucial point of the difference. The *contrast,* if permissible, which I think not, is not made in the charge *"merely a circumstance,"* but the *"right and duty"* to consider it upon mental capacity. The learned and careful judge who tried this case did not prepare the part of the charge hereinafter referred to. It was prepared by caveators and one of their prayers for instruction is as follows: "It is true, as contended by propounders, that a man may make a will and then revoke or change it by a later one. In reply to this, caveators contend that in April, 1924, less than two years before his death, Judge Brown made a will which fully and reasonably disposed of his large estate and put it in safe and competent hands, recognizing his moral and legal obligations in respect of his estate and providing for all those having claims upon him and it. They contend that this will represented his seasoned judgment and long experience; that it was carefully thought out and prepared, as disclosed by letters in evidence, and safeguarded both the bulk of the estate and the income therefrom; that this income amounts to about $25,000 per year, and is practically free from taxation; that this entire income was devised to his wife for her lifetime, to do with as she pleased, and in addition she was given the residence with household furniture and effects in fee simple, together with the absolute right of disposing of $50,000 more as she saw fit by her will, thereby making full and ample provision for her. They contend further that this will of April, 1924, recognized and provided for the old colored woman, Pauline, who served in his household for fifty years or more, giving her a legacy of $200 in cash and $40 per month for her support; that to Mr. Arthur Mayo, who had acted as his clerk or business agent for many years, he gave the office on Market Street in recognition of long friendship and faithful service, and that the giving of this office to Mr. Mayo did not impair or appreciably diminish the annual income of about $25,000 to his wife; that instead of vesting absolute title to the bulk of his estate in his wife or his relatives, he instead vested it in the Raleigh Savings Bank and Trust Company for her and their benefit and protection, to the end that the estate might be carefully safeguarded; that he was careful to anticipate the cost of administration and made a contract with this Savings Bank and Trust Company, with which he had dealt for many years, about commissions or fees; that in this will of April, 1924, he did not forget Mrs. A. D. McLean and her children, of whom he was very fond, but left substantial legacies for them, and that the residue or remainder of his estate was given to his nephews and nieces per capita, that is, share and share alike; the income from the shares of Brown Shepherd, a nephew, and Eleanor Whitney, a niece, to go to their mothers, Mrs. Shepherd and Mrs. Crabtree, during their lives, respectively; that this will was deposited in his box in the Bank of Washington and his close business friends and confidential advisers, Jos. G. Brown and W. Reid Martin, of Raleigh, were duly notified to that effect, and that upon the death of Judge Brown, Mr. Joseph G. Brown came to Washington expecting to find and probate this will, never having been informed of any change; and in contrast with this carefully thought and well prepared will, as they contend, caveators point out that the alleged will of 5 January, 1926, while in sufficient legal form to pass as a will, is badly drawn, executed in less than two and a half months before Judge Brown's death, after he had become feeble in body and mind, and that it is entirely different both in form and in fact from what Judge Brown really intended and desired to do with his property. The court charges you, upon these contentions, *that it is the right and duty of the jury to consider them and to contrast the two alleged wills as bearing upon the issue of mental capacity and the testamentary disposition which Judge Brown made or intended to make of his property."*

The basis of this first alleged will had its primary foundation in a letter of Judge Brown, dated 5 August, 1924. At that time he was conceded to be sane and of disposing mind. In this letter he states "Of course you will regard this letter as strictly confidential and destroy it. . . . God's will be done, but when my time comes I hope I may pass out quickly." This request "destroy it" may mean that he left open the idea of a change in the future. The caveators, with remarkable legal skill and ability in a request to charge, took this alleged will founded on the letter as a basis, with ingenuity stated almost as a fact, although set forth as a contention, as follows: *"which fully and reasonably disposed of his large estate—put it in safe and competent hands—recognizing a moral and legal obligation—his seasoned judgment and long experience—carefully thought out and prepared—safeguarded—making full and ample provision"* for his widow—*"provided for the old colored woman"* and Mr. Arthur Mayo, *"in recognition of long friendship and faithful service,"* giving him the office on Market Street. Then in the contentions was humanly stated *the call of the blood relations.* The powerful array of contentions was striking and in language hard to excel. The *contrast* was demanded between this and the will of 5 January, 1926, with only this short statement: *"While in sufficient legal form to pass as a will is badly drawn," "executed two and a half months before Judge Brown's death,"* and then stating the contrast contention as a fact, *"after he became feeble in body and mind," and that it is entirely different both in form and in fact from what Judge Brown really* *intended and desired to do with his property.*" What are the facts which, if permissible, should be contrasted in favor of propounders?

The alleged will of 5 January, 1926, is as follows:

"Know all men that I, George H. Brown of Washington, Beaufort County, No. Ca. do make & declare this to be my last will and testament; I bequeath & devise to my dear wife Laura E. Brown all my property real & personal to be hers absolutely in fee simple including my residence & law office on Market Street in Washington, No. Ca.

"This Jany. 5, 1926. I also appoint my said wife Executrix to this will without her giving any bond. GEO. H. BROWN.

"GEORGE H. BROWN.

"Witness: JESSE B. ROSS.

"Witness: WM. B. HARDING.

"We have signed this will of Geo. H. Brown in his presence as witnesses, and in his presence and in the presence of each other.

"WM. B. HARDING.

"JESSE B. ROSS."

On back of will:

"Last Will and Testament of George H. Brown of Beaufort County, N. C. Made Jany. 5, 1926. GEO. H. BROWN, 1926.

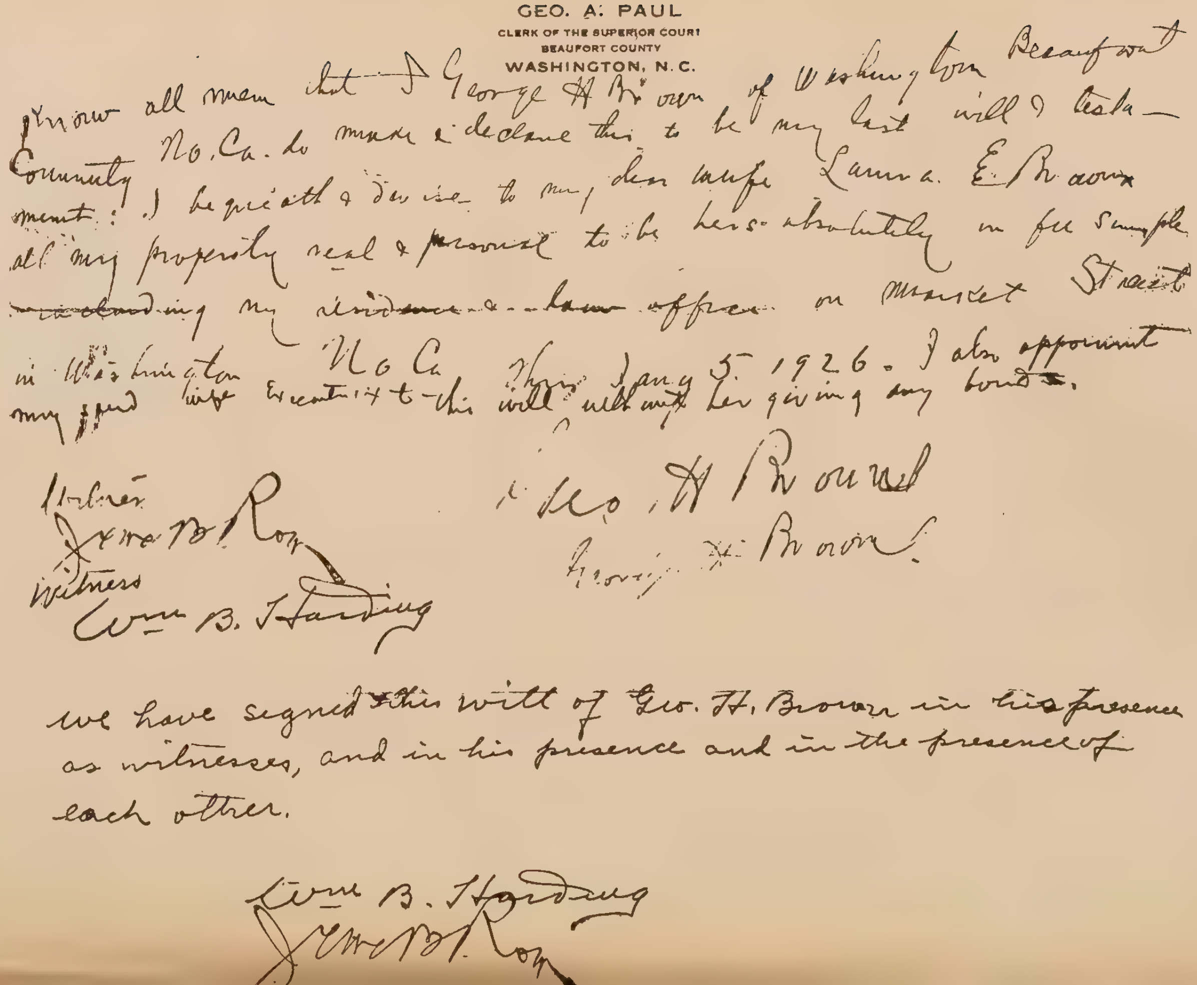
"Deposited in my lock box among my valuable papers. This Jany. 5, 1926. GEO. H. BROWN, Witness J. B. Ross."

On envelope:

"Geo. H. Brown Last Will and Testament. Filed in this box with my valuable papers. This Jany. 5, 1926. GEO. H. BROWN."

It was in Judge Brown's handwriting—legible. The two witnesses to the will testified that when Judge Brown signed it and they witnessed it, it was done as the writing on the will indicated, and they testified in substance that, in their opinion, he had sufficient mental capacity to know what property he owned, to know his relatives, to know and appreciate the claims, if any, which they had upon him, and if he desired to make a will to know and understand the scope and effect of such testamentary disposition.

He left his property to *"my dear wife,"* who had been married to him for half a century. The will was most carefully drawn and according to the law of this State, was both a written and holograph will. In caveators' contentions, as above set forth, a graphic picture is drawn in the interest of the blood relations which practically negatives the claim of the wife who had been his helpmeet for a half century and made it possible, no doubt, by economy, self-denial and thrift, to help accumulate the fortune.



GEO. A. PAUL
CLERK OF THE SUPERIOR COURT
BEAUFORT COUNTY
WASHINGTON, N. C.

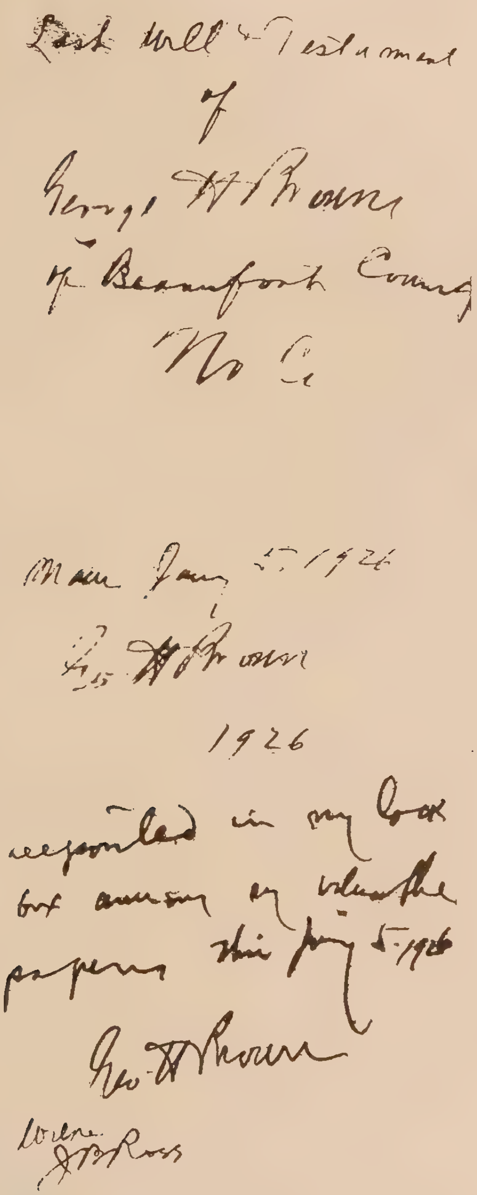
Know all men that I George H Brown of Washington Beaufort County No. Ca. do make & declare this to be my last will & testament: I bequeath & devise to my dear wife Laura E Brown all my property real & personal to be hers absolutely in fee simple ~~includ~~ing my ~~residence & law~~ office on Market Street in Washington N. C. This Jany 5 1926. I also appoint my said wife Executrix to this will without her giving any bond.

Geo. H Brown
George H. Brown

Witness
Jerome B. Roy
Witness
Wm B. Harding

we have signed this will of Geo. H. Brown in his presence as witnesses, and in his presence and in the presence of each other.

Wm B. Harding
Jerome B. Roy

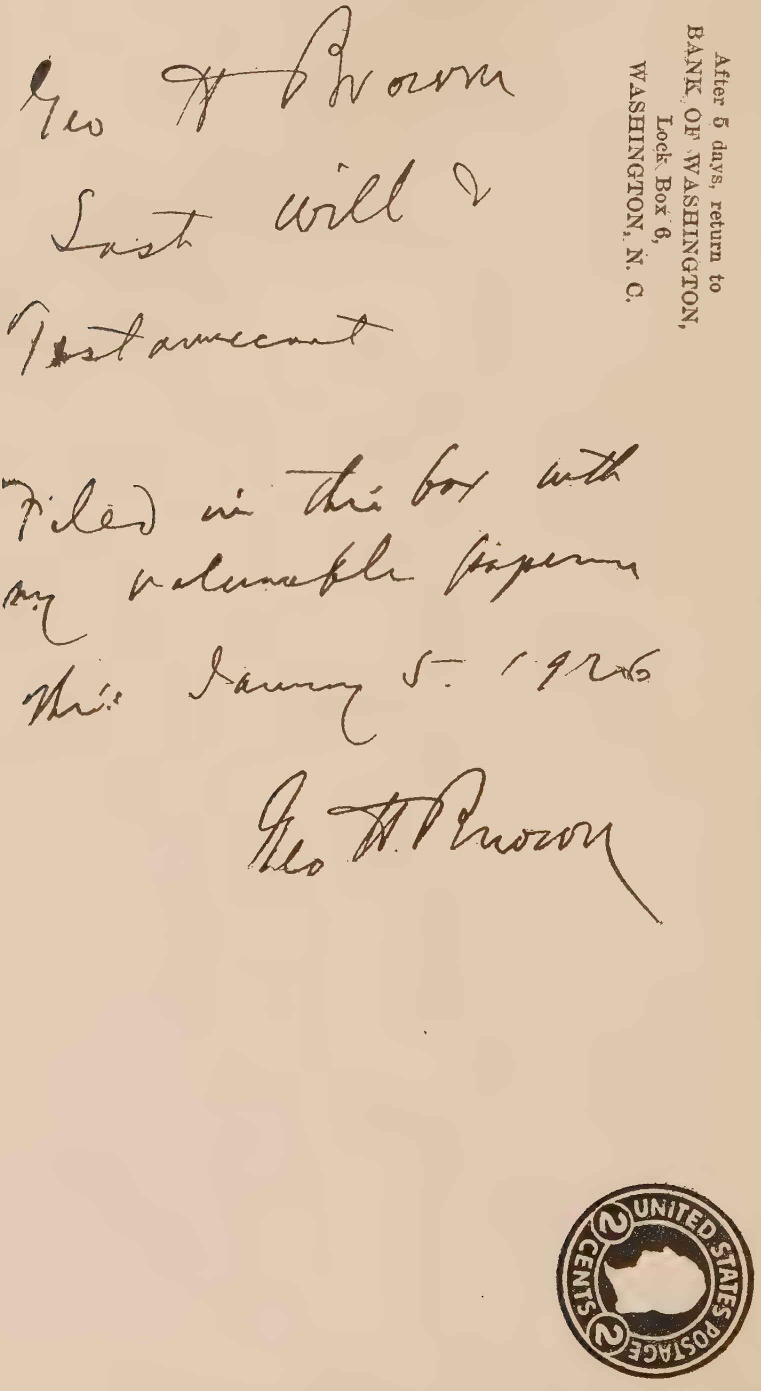


Last Will & Testament
of
George H Brown
of Beaufort County
No C

Made Jany 5 1926
Geo H Brown
1926

deposited in my box
for among my valuable
papers this Jany 5-1926
Geo H Brown

Witness
J B Ross



Geo H Brown
Last Will &
Testament

Filed in this box with
my valuable papers
this Janury 5. 1926

Geo H Brown

After 5 days, return to
BANK OF WASHINGTON,
Lock Box 6,
WASHINGTON, N. C.

UNITED STATES POSTAGE
2 CENTS 2

The powerful array of contentions by caveators was a *call of the blood* and negatived the *call of the wife.* The jury were instructed in the language of caveators' request, by a judge in whom, as a matter of common knowledge, all have confidence *"that it is the right and duty of the jury to consider them and to contrast the two alleged wills."* Not a *circumstance,* as the main opinion would indicate, but the *right and duty*—the definite duty. As said by a heroic Southern man, whose life was an inspiration, "Duty is the sublimest word in the English language." The caveators' request as given in the setting, was a call to the blood, and "my dear wife"—she who was "bone of my bones and flesh of my flesh," the helpmeet of over a half century—from the charge as given practically forgotten. The minds of the jurors, the triers of the facts, heard only the *duty* to the *call of the blood relations* in the charge as given, but penned by those representing the blood and adopted as the law by the able judge who tried the case. It was a charge that gave the widow little chance before a jury and, in my opinion, was erroneous in law and never before held to be law in this jurisdiction. In fact the use of the words *"merely a circumstance"* shows that this is as far as the majority of this Court will go now or in the future, yet they ignore the charge going further—*"right and duty,"* on the issue of mental capacity.

Arthur Mayo, referred to in the caveators' contentions, testified: "I am trying to help the caveators in this litigation; my interest lies that way." Then again: "I cannot believe that he was of sound mind when he made that will, considering all the circumstances (his reversal of previous statements). I think he was crazy. If he had given me the office in the will I could not say that I would have the opinion that he was of unsound mind. I probably would not." Yet the charge is the *right and duty* of the jury to consider the contentions as written by caveators and requested by them and make the *contrast.*

The following principle is well stated by *Justice H. G. Connor,* a jurist of learning and wide experience, *In re Peterson,* 136 N. C., at p. 27 (in 1904): "In the light of the experience and observation of men of the best judgment and soundest minds, we can see nothing in the fact that this man gave his estate, the product of their joint industry and economy, to his wife, tending to show mental incapacity or undue influence. We do not think it tended to show either undue influence or mental incapacity. It seems, in the light of the testimony, the most natural and fitting expression of affection and solicitude of the testator."

It was testified to by all the witnesses that Judge Brown was a distinguished looking man. He had one of the greatest minds. His neighbor, Rev. S. A. Cotton, a witness for caveators, testified in part:

"I saw them together (speaking of his wife) a good many times; my observation led me to the conclusion that there was the usual ripeness and intensity of association you would expect to see between a couple of that age. I saw nothing in that respect except something to commend."

In the letter of Judge Brown, with request to destroy, which was used as a basis of a will, this great mind said, "God's will be done . . . I hope I may pass out quickly," but he tarried on, and who can tell that when he calmly looked to the end, this human mind found, a problem that puzzles the greatest minds, the call of *"my dear wife"* was greater than the call of the *blood relations*—the half century of life together—and he changed his mind and left all to his helpmeet. The *contrast*, as charged by the court below—*the right and duty* of the jury to consider it upon mental capacity, not *merely a circumstance*, as stated in the main opinion, was perhaps to them almost an instruction in favor of the caveators and a call of the blood, and they so decided. In my judgment it was error and prejudicial to the rights of the widow.

The inner sanctuary of this great jurist should not be forgotten. His wife testified: "During the last days of Judge Brown's life the intimacy of our associations could not have been closer than it was; he said to me, 'Laura, now that I know your real worth, I wish I could begin all over again.' We were sitting in the library together; he said 'I have worked so hard I wish I had a million to leave you.' . . . I had many conversations with him on spiritual matters, many such conversations, when I expressed my pleasure at his belief, I told him that I was glad that he believed. He said, 'I have always believed.' He had made it a practice for years—almost required it—to read the Bible in the morning, and during this illness he asked me every evening to go upstairs and read the Bible to him, which I did. Many times I repeated to him hymns he enjoyed very much hearing, and one especially, 'Sun of my soul, Thou Savior dear.'" Perhaps leaving the property to his helpmeet of half a century was the crowning human act of justice of this jurist—trusting her to do right to his blood. But we here are not the triers of fact. In this jurisdiction we can only pass on error in law. The family relation of husband and wife is sacred now and should ever be. The *contrast* in the charge, in my opinion, was prejudicial to the rights of the wife, and a new trial should be granted.

WACHOVIA BANK AND TRUST COMPANY, ADMINISTRATOR OF MARTIN C. FREEMAN, v. EMMA MATTHEWS FREEMAN ET AL.

(Filed 23 November, 1927.)

Executors and Administrators—Sales—Deeds and Conveyances—Tender—Time Not the Essence—Change in Value of Lands.

Where upon the petition of an administrator the court appoints a commissioner to sell the lands of the intestate, encumbered by mortgage, and convey title upon receiving part cash and the balance in certain deferred payments, it is required that the commissioner tender proper deeds to the purchaser, with satisfaction slip, or cancellation of the mortgage, and while time may not be regarded as of the essence of the contract, the purchaser will not be required to accept the deeds if by a prolonged delay the values of the lands purchased have changed.

APPEAL from *Oglesby, J.*, at July Term, 1927, of RICHMOND.

The plaintiff filed a petition before the clerk to sell for assets certain real estate of which its intestate had died seized: (1) The home place in Hamlet; (2) a lot on Spring Street; (3) four lots on Hamlet Avenue; (4) about 50 lots near the cemetery. A supplemental petition was filed in which the plaintiff alleged that the following offers for the purchase of the property had been made: for the home place $5,450, by Mrs. J. C. Hedgepeth; for the lot on Spring Street $905, by S. P. Peele; for the lots on Hamlet Avenue $1,920, by J. S. Braswell; for the other lots $4,000, by H. B. Ingram, Vernon Allen, and J. S. Braswell. The clerk adjudged that the offers should be approved and that the terms of sale should be not less than one-third cash and the remainder in two equal annual installments, to be evidenced by notes bearing interest and to be secured by first mortgages on the property conveyed; and further, that a commissioner be appointed to execute deeds therefor to the respective purchasers upon payment in part, and the execution of notes and deeds of trust to secure them. A commissioner was appointed to make the sale and conveyance to the purchasers, and he filed a report to the effect that he had tendered deeds to the respective parties and that they had declined to accept them. An order to show cause was then issued and served upon J. S. Braswell individually and upon J. S. Braswell, H. B. Ingram, and Vernon Allen as joint bidders, and they filed answers alleging outstanding and unpaid mortgages on all the property. The controversy thus raised was referred by consent to R. C. Lawrence to determine and report all matters of fact and law. He made a report setting forth his findings of fact (to which there was no exception) and his conclusions of law, which are as follows:

1. The purchasers should not be relieved of their bids on account of any delay of the commissioner in tendering the deeds, because such delay

was primarily due to the fact that the attorneys for the purchasers had not completed the examination of the title, and also because time is not of the essence of such a contract. *Davis v. Martin,* 146 N. C., 281; *Crawford v. Allen,* 189 N. C., 434, and other cases.

2. As it was incumbent upon the sellers to tender a good and perfect title to the purchasers before the purchasers could be required to comply with the terms of their bids, it was incumbent upon the sellers to tender a proper satisfaction slip or cancellation of the mortgage held by W. R. Land, as well as a deed in proper form executed by the commissioner, and as there was no tender of such cancellation or satisfaction slip, executed by W. R. Land, the mortgagee, the purchasers could not be required to comply with the terms of their bids.

3. As a matter of technical law, the conclusion reached in the last above paragraph is true, notwithstanding the facts found by the referee in paragraph seventeen of the findings of fact.

4. As time is not of the essence of the contract, a good and sufficient tender might yet be made were it not for the change in value which has taken place since the contract with respect to the lands which are the subject of this action.

5. The referee therefore concludes that plaintiff is not entitled to enforce the bids of J. S. Braswell, and J. S. Braswell and others, and that the respondents are entitled to go without day.

The plaintiff excepted to the second, third, and fifth conclusions; also because the referee failed to conclude as a matter of law that the plaintiff was entitled to the relief demanded.

The judge overruled the exceptions and gave judgment for the defendants. The plaintiff excepted and appealed.

Biggs & Broughton for plaintiffs.
Gibbons & LeGrand and Bynum & Henry for defendants.

PER CURIAM. In its petition to sell the intestate's real property for assets the plaintiff alleged that mortgages in the aggregate amount of $12,000 were outstanding against all the property. When notice to show cause why they should not comply with their offer of purchase was served on J. S. Braswell individually and on Braswell, Ingram and Allen as joint bidders, they set up the lien of the mortgages and alleged that they had notified the commissioner that "the said mortgage liens would have to be paid and canceled of record as agreed upon on the date of said sale before the respondents would accept title to the same and pay the purchase price agreed upon." The referee found as facts that the plaintiff had made an arrangement with one of the mortgagees whereby he was to accept the cash and notes of the purchasers and cancel his mortgage, and that it was announced at the sale that this arrangement would be carried out; but that when the commissioner tendered his deed the mortgagee was not present and that no cancellation or release of his mortgage had been tendered the purchasers. Thereupon the referee held as a conclusion of law that it was incumbent upon the seller to tender a good and perfect title before the purchasers should be required to comply with their bids and that the plaintiff under the circumstances could not enforce the purchasers to accept the commissioner's deeds and to comply with the remaining terms of their offer of purchase. The presiding judge confirmed the referee's report and held that the plaintiff could not enforce the bids. We find no error in this ruling and accordingly affirm the judgment.

Affirmed.

ROBERT TRANTHAM v. THE ELK FURNITURE COMPANY.

(Filed 30 November, 1927.)

Verdict—Polling Jury—Conflict—Entry—Appeal and Error.

Where the jury has unanimously answered and returned their verdict to an issue in a civil action, and upon being polled three of them answer differently and explain by saying the answer first given was the one they had at first entertained before agreeing with the others, and again being polled the verdict is unanimously in accord with the answer of the issue handed in: *Held*, there is nothing to indicate that the verdict so entered was reached by outside influence or that its sacredness had been violated, and its entry as the verdict in the case is not erroneous.

CIVIL ACTION, before *Harding, J.*, at July Term, 1927, of DAVIDSON.

Plaintiff instituted an action against the defendant for damages for personal injury sustained by reason of what plaintiff alleged was a defective machine.

The defendant, among other defenses, pleaded that a full settlement had been made with the plaintiff and a release taken in discharge of its liability. Thereupon the plaintiff alleged that the release was secured by means of fraud.

Issues arising upon the pleadings were submitted to the jury. The first issue is as follows: "Was the release set out in the answer of the defendant procured by fraud as alleged in the reply of the plaintiff?" The jury answered this issue, "No," and did not answer any other issue. From the judgment rendered plaintiff appealed.

Walser & Walser and Phillips & Bower for plaintiff.

McCrary & DeLapp for defendant.

BROGDEN, J. The only point presented in the case is based upon the following facts: "The jury then came into the court, and through its foreman, handed the presiding judge the issues. The first issue, answered 'No.' The other issues are not answered. Whereupon, stated the court, 'You answer the first issue "No," all of you say that?' And the jury said, 'Yes.' Counsel for the plaintiff then moved the court to have the jury polled; whereupon the presiding judge requested the jury to stand, and said to the jury: 'As many of you as now favor to answer the issue "Yes" will say "Yes," and those who favor answering it "No" will say "No."' In the calling of the roll nine jurors answered 'No' and three answered 'Yes.' The court stated to the jury that it did not understand why they should bring in a verdict with the issue answered 'No' when three were answering when their names were called they desired to answer it 'Yes.' Thereupon of those answering 'Yes' when called, two explained that they meant how they stood in the vote before they had reached a final answer to the issue as signed, and not as to how they stood at the particular moment, that is the moment of the calling of the roll of the jury. Whereupon the presiding judge instructed the clerk to again call the roll of the jury and instructed the jury that those in favor of answering the issue at this time, at the time of the calling of the roll, would answer when their names were called, those who desired to answer 'No' to the issue would say 'No,' and those desiring to say 'Yes' would say 'Yes.' Whereupon the clerk called the roll and twelve jurors answered to their names and said 'No.' Whereupon the court ordered the clerk to record the verdict of the jury as polled."

The verdict of a jury is sacred. It should represent the concurring judgment, reason and intelligence of the entire jury, free from outside influence from any source whatever. The trial judges have no right to coerce verdicts or in any manner, either directly or indirectly, intimidate a jury. But there is nothing in this record which, in our judgment, casts the slightest cloud or suspicion upon this verdict. The jury returned a signed verdict into court. A poll was taken, and upon roll call it developed that three of the jurors had originally been in favor of answering the issue "Yes," but after a full discussion in the jury-room these same jurors had agreed to answer it "No," and such unanimous finding was duly reported to the court. The poll was taken in open court and entirely free from the slightest intimation by the trial judge.

The case of *S. v. Godwin,* 27 N. C., 401, is directly in point. In that case the jury brought in a verdict of guilty of murder and were polled at the request of the prisoner. "Eleven of them, each for himself, answered simply that he found the prisoner guilty. The remaining juror answered that when the jury first went out he was not for finding the prisoner guilty, but that a majority of the jury was against him, and that he then agreed to the verdict as delivered by the foreman. He was further asked, 'What is your verdict now?' and he replied, 'I find the prisoner guilty.'" The opinion of the court states: "There is nothing to raise a suspicion that the verdict was not the result of the conscientious and unanimous conviction of the jurors. One of them hesitated at first, as any man may upon so solemn a question; but, upon consultation with his fellows, and deliberation, he united publicly and of his own accord in the verdict." In like manner in the case at bar the three jurors, after the original verdict had been rendered, still united publicly and of their own accord in the verdict. *Lowe v. Dorsett,* 125 N. C., 301.

No error.

KATHRYN L. ELDER v. PLAZA RAILWAY.

(Filed 30 November, 1927.)

1. **Negligence—Contributory Negligence—Evidence — Street Railways — Automobiles—Proximate Cause—Concurring Causes.**

   Where the evidence in a personal injury damage case, including that of plaintiff, tends only to show that while driving her automobile upon a street of a city at night, the plaintiff endeavored to pass another automobile from behind, was blinded by the lights from still another automobile and drove upon the track of defendant's street railway, and as evidenced by the rate of speed within the law each was going, was almost immediately struck by defendant's street car moving in an opposite direction, the plaintiff under the circumstances not being aware of its approach; assuming that the defendant was negligent in not giving warnings of the approach of the street car, or in not having provided it with a fender: *Held,* upon the uncontradicted facts, the plaintiff's contributory negligence barred her recovery, upon the principle that her negligence coöperated with the negligent act of the defendant, and became the real, efficient and proximate cause of the injury complained of, or that without which the injury would not have occurred.

2. **Evidence—Contributory Negligence—Nonsuit—Statutes.**

   Contributory negligence may be taken advantage of on a motion as of nonsuit when the plaintiff's own evidence tends only to establish it. C. S., 567.

APPEAL by defendant from *Finley, J.,* at May Term, 1927, of MECKLENBURG.

Civil action to recover damages for an alleged negligent injury resulting from a collision between defendant's street car and plaintiff's automobile.

The evidence tends to show that on the night of 2 January, 1926, about 11:25 p.m., the plaintiff, Mrs. Kathryn L. Elder, was driving eastwardly along Central Avenue in the city of Charlotte in a closed Ford coupé, when she collided with one of the defendant's street cars moving westwardly along said street, and was seriously injured.

Plaintiff testified substantially as follows: I was riding behind a Chrysler car which was throttled down to three or four miles an hour. As I could not throttle my car down as slow as that, I blew my horn and drew over to the left to pass, and in doing so, I had to get on the street-car track, as there was not room enough for me to pass, they were driving so far away from the curbing. At this point the street-car line is a single track. As I drew alongside of the Chrysler, they speeded up to keep me from passing. I immediately dropped back behind them, when they slowed down again. I then blew my horn and drew over to the left, starting to pass, and there was another automobile approaching me (from beyond the street car) going in a westerly direction, with lights so bright that they blinded me, and as I drew alongside the Chrysler they speeded up again to keep me from passing, and I knew there was no use in my trying to pass with this bright light in my face, so I attempted to drop back behind the Chrysler again, when I was hit by the street car, and that is all I remember. The wheels of my Ford coupé were on the street-car track when I was hit. I didn't see the street car coming along. I didn't hear any signal of any kind. The crash occurred about the center of the block. There is a considerable slope at that point, and I was going up grade.

According to the uncontradicted evidence of the witnesses, the plaintiff came from behind the Chrysler and ran upon the track from 12 to 20 feet in front of the moving street car, which was going down grade, while plaintiff was traveling up grade, and the collision took place almost instantly.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. From the judgment entered thereon, the defendant appeals, assigning errors, chiefly because of the refusal of the court to nonsuit the plaintiff.

Tillett, Tillett & Kennedy for plaintiff.
John M. Robinson and Talliaferro & Clarkson for defendant.

STACY, C. J., after stating the case: The defendant's negligence may be conceded, or that there is evidence tending to establish it, but it is stressfully contended that the plaintiff's own testimony shows such contributory negligence on her part as to bar a recovery.

Plaintiff does not say how long she was on the track before the collision, but a fair inference from her testimony is that it occurred almost immediately after she ran from behind the Chrysler automobile. The uncontroverted testimony of all the witnesses is to the effect that when the plaintiff ran upon the track the moving street car was not less than 12 nor more than 20 feet away. Assuming that the motorman and the plaintiff, running in opposite directions, or towards each other, were both moving at a rate of about 15 or 20 miles an hour, which is considerably less than some of the witnesses put the plaintiff's speed, this would leave but a short interval of time for the motorman to stop. In fact, too short for practical purposes. The plaintiff, according to her evidence, made no effort to stop, as she did not see or hear the street car. She testified that she was blinded by the bright lights of an automobile approaching from the opposite direction. Under this evidence, we think the proximate cause of the injury must be referred to the plaintiff's own negligence. The absence of a fender on the front of the street car, as testified to by some of the witnesses, could not have been the sole cause of the injury. No fender, practical or other, would have prevented the collision. And it is sufficient to bar a recovery, in an action like the present, if the plaintiff's negligence is one of the proximate causes of the injury. It need not be the sole proximate cause. *Construction Co. v. R. R.,* 184 N. C., 179, 113 S. E., 672.

Contributory negligence, such as will defeat a recovery in a case like the one at bar, is the negligent act of the plaintiff, which, concurring and coöperating with the negligent act of the defendant thereby becomes the real, efficient and proximate cause of the injury, or the cause without which the injury would not have occurred. *Moore v. Iron Works,* 183 N. C., 438, 111 S. E., 776.

Speaking to this subject in *Fulcher v. Lumber Co.,* 191 N. C., 408, 132 S. E., 9, *Connor, J.,* delivering the opinion of the Court, said: "Contributory negligence on the part of plaintiff, except where otherwise provided by statute, is held to bar recovery of damages resulting from the negligence of defendant if such contributory negligence concurs with the negligence of defendant, as a proximate cause of the injury. It implies *ex vi termini* that the negligence of defendant is a cause of the injury."

Originally, under C. S., 567, in cases calling for its application, there was some question as to whether a plea of contributory negligence (the burden of such issue being on the defendant) could be taken advantage of on a motion to nonsuit, but it is now well settled that such may be done when the contributory negligence of the plaintiff is established by his or her own evidence, as he or she thus proves himself or herself out of court. *Holton v. R. R.,* 188 N. C., 277, 124 S. E., 307;

Davis v. R. R., 187 N. C., 147, 120 S. E., 827; *Wright v. R. R.,* 155 N. C., 325, 71 S. E., 306; *Horne v. R. R.,* 170 N. C., 645, 87 S. E., 523.

In our opinion, according to plaintiff's own showing, the collision was clearly due to her own negligence, and in such case, on motion, duly made in apt time, judgment as of nonsuit should have been entered. *Davis v. R. R.,* 187 N. C., 147, 120 S. E., 827; *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769.

Reversed.

CLARKSON, J., dissenting: I think on the evidence that a new trial should have been granted, and that the doctrine of last clear chance is applicable, and an issue should have been submitted to the jury to that effect.

"Could the defendant, by the exercise of ordinary care, have avoided the injury to the plaintiff, notwithstanding the negligence of the plaintiff?" This is a question of fact for the jury and not the court to determine.

Plaintiff's testimony, in connection with the other evidence in the case, unnecessary to set out, entitled plaintiff, in my opinion, to the issue. *Wheeler v. Gibbon,* 126 N. C., p. 811; *Norman v. R. R.,* 167 N. C., p. 533; *Fleming v. Utilities Co.,* 193 N. C., p. 262.

STATE v. M. S. LEWIS.

(Filed 30 November, 1927.)

1. **Indictment — Defects — Schools — School Terms — Public Schools — Statutes—Criminal Law.**

   An indictment under the provisions of C. S., 5758, charging a parent with unlawfully and wilfully failing to cause his children, between the ages of 8 and 14 years, to attend the public schools of the district of his and the children's residence, as required by the statute, is defective in not observing the distinction that the parent, having the custody of his children, may have them attend private schools for the required period, and no conviction may be had under the charge set out in the indictment.

2. **Judgments—Arrest of Judgment—Indictment—Defects in Indictment.**

   Where a fatal defect in the charge of an indictment for a criminal offense, appears upon its face, it may be taken advantage of by motion in arrest of judgment.

APPEAL by defendant from *Schenck, J.,* at April Term, 1927, of CABARRUS.

Criminal prosecution tried upon a warrant charging that the defendant "on or about the .... day of February, 1927, did unlawfully and wilfully fail to cause his children, between the ages of 7 and 14 years, to attend public school in Kannapolis, in the district in which said children reside, as required by the statute in such cases made and provided," etc.

From an adverse verdict and judgment pronounced thereon, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

H. S. Williams and Z. A. Morris, Jr., for defendant.

STACY, C. J. The judgment must be arrested on authority of what was said in *S. v. Johnson,* 188 N. C., 591, 125 S. E.. 183, for that no crime is charged in the warrant upon which the defendant has been tried and convicted.

It is provided by C. S., 5758, with certain exemptions not now material, that every parent, guardian, or other person in the State having charge or control of a child between the ages of eight and fourteen years "shall cause such child to attend school continuously for a period equal to the time which the public school in the district in which the child resides shall be in session."

It will be observed that the statute does not make the failure to cause the attendance of a child, between the ages mentioned, in the public school a crime, but the offense is defined as the failure on the part of the parent, guardian, or other person having control of such child, to cause said child to attend school continuously for a period equal to the time the public school of the district shall be in session. Indeed, it would be an infringement upon the rights of private schools to require that all children of school age shall attend one of the public schools of the district in which they reside. *Pierce v. Society of Sisters,* 268 U. S., 510.

The defect or omission appearing, as it does, on the face of the record, may be taken advantage of by motion in arrest of judgment. *S. v. Jenkins,* 164 N. C., 527, 80 S. E., 231; *S. v. Baker,* 106 N. C., 758, 11 S. E., 360.

Error.

STATE v. WALTER BARNHARDT.

(Filed 30 November, 1927.)

1. **Criminal Law—Indictment—Spirituous Liquor—Intoxicating Liquor—Felonies—Misdemeanors—Verdict—Judgment.**

   An indictment charging separately the unlawful manufacture of spirituous liquor, permitting the operation of a distillery on his land, the unlawful possession, and the unlawful manufacture after conviction for the same offense, charges only misdemeanors except as to the last count, and when there is no evidence as to the former conviction, a general verdict of guilty should be set aside as to this count, and a judgment imposing a maximum and minimum sentence is reversible error. C. S., 3409, 7738.

2. **Judgments—Motions to Set Aside—Criminal Law—Verdict—Felony.**

   A motion to set aside a verdict in a criminal action including a felony, with other counts charging misdemeanors, should be granted where there is no evidence that the defendant committed a felony and sentence for the felony has been imposed, and on appeal the case will be remanded.

APPEAL by defendant from *Finley, J.*, at August Term, 1927, of CABARRUS. Error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Palmer & Blackwelder, Hartsell & Hartsell and Williams & Morris for defendant.

ADAMS, J. In the indictment the defendant is charged (1) with the manufacture of spirituous liquor; (2) with permitting the operation of a distillery on his land; (3) with the unlawful possession of liquor; and (4) with the unlawful manufacture of liquor after a previous conviction for the same offense.

The first three counts charge misdemeanors; the fourth charges a felony. C. S., 3409. The jury returned a general verdict, finding the defendant guilty. It was then adjudged that he be confined in jail for a term of not less than twelve nor more than eighteen months and assigned to work on the public roads.

It is admitted by the State that there is no evidence of the defendant's former conviction. The verdict, therefore, cannot be sustained so far as it may apply to the fourth count. Upon the others, in which misdemeanors are charged, an indeterminate sentence cannot be imposed. The judges of the Superior Court are authorized and directed, in their discretion, "to pass a maximum and minimum sentence" only in sentencing prisoners to the State's prison. C. S., 7738; P. L. 1925, ch. 163, sec. 7738.

There is error for which the cause must be remanded. The defendant's motion to set aside the verdict on the fourth count should be allowed, there being no sufficient evidence to sustain the verdict as to the felony. Upon the remaining counts a determinate sentence should be imposed. The other exceptions are without merit and are therefore overruled.

Error.

H. N. SIMPSON v. FIELDING L. FRY ET AL.

(Filed 30 November, 1927.)

Fraud—Presumptions—Mortgages — Trusts — Deeds and Conveyances—Pleadings—Demurrer—Burden of Proof.

Where a debtor conveys land to a trustee to secure a note given for the debt, the trustee holds the lands in trust for both of the parties to the conveyance, and where the debtor sells and conveys his equity in the *locus in quo* to his creditor in payment, there is no presumption of fraud in the transaction that would invalidate it at the suit of the creditor, and the burden of proof is on him to establish the fraud, and upon his failure to allege in his complaint facts beyond the existence of this relationship, the plaintiff's demurrer to the complaint, *ore tenus*, is good.

APPEAL by plaintiff from *Shaw, J.,* at September Term, 1927, of GUILFORD. Affirmed.

Action to cancel and set aside deed executed by plaintiff, conveying to defendant, Fielding L. Fry, a certain lot of land, which he had conveyed theretofore to a trustee to secure his note, payable to the order of the said Fielding L. Fry. At the date of the execution of said deed the note secured by the deed of trust was due and unpaid, and the trustee was then authorized and empowered to sell and convey the land described therein, and, after paying said note out of the proceeds of said sale, to pay the balance, if any, to plaintiff. Subsequent to the execution of said deed, the said Fry had conveyed the land described therein, and his codefendants now claim interests in said land under said conveyance. The validity of these claims, as against the plaintiff, is dependent upon the validity of the deed which plaintiff by this action seeks to have canceled and set aside.

Plaintiff contends that upon the facts alleged in the complaint, and admitted in the answers, the said deed is voidable and should be set aside, for that it is a conveyance of his equity of redemption in said land to his creditor, whose note is secured by the deed of trust, which had been theretofore executed by him, and was uncanceled at the date of the deed; that the law presumes from the admitted relationship between him, as grantor, and his secured creditor, as grantee, at the date of its execution, that said deed was procured by the fraud and undue influence of the grantee, and that as no facts are alleged in the answers in rebuttal of such presumption, he is entitled to judgment on the pleadings, in accordance with his motion made at the trial in the Superior Court.

Defendants contend that in the absence of specific allegations in the complaint of facts which show that the execution of the deed was procured by fraud and undue influence, on the part of the grantee, the complaint does not state facts sufficient to constitute a cause of action, and that the demurrer, *ore tenus,* to the complaint on that ground should be sustained; that there is no presumption, from the relationship of grantor, as debtor and grantee, as creditor secured in the deed of trust, that said deed was procured by fraud and undue influence, requiring allegations in the answer in rebuttal; and that upon all the facts alleged in the complaint and admitted in the answers, defendants are entitled to judgment on the pleadings, in accordance with the prayers in their answers to the complaint.

From judgment denying plaintiff's motion for judgment on the pleadings, and sustaining defendants' demurrer, *ore tenus,* to the complaint, and further, granting to defendants the relief demanded in their answers, plaintiff appealed to the Supreme Court.

Leland Stanford and Robert C. Strudwick for plaintiff.

Banks H. Mebane for defendants, Fry and King.

Hobgood, Alderman & Vinson for defendant, Sidney S. Alderman, trustee.

CONNOR, J. It is alleged in the complaint and admitted in the answers, that prior to the commencement of this action, and prior to the controversy from which the action arose, plaintiff was the owner in fee of the lot of land described in the complaint; that for the purpose of securing his note for $900, payable to the order of the Gate City Building and Loan Association, plaintiff conveyed the said lot of land, by deed of trust, to a trustee; that, thereafter, for the purpose of securing his note for $500, payable to the order of Fielding L. Fry, plaintiff conveyed the said lot of land, by deed of trust, to another trustee; that when the note payable to the order of Fielding L. Fry became due, plaintiff failed to pay same, and thereafter conveyed the said lot of land, described in both said deeds of trust, to said Fielding L. Fry, "by deed absolute in form, with usual covenants of warranty and containing no expression of any trust or condition, but purporting to convey said premises to said Fry in fee simple."

The defendant, Fielding L. Fry, subsequently conveyed the lot of land to defendant, Sidney S. Alderman, trustee, to secure a note executed by defendant, J. W. King, and payable to the order of the Independence Indemnity Company, of Philadelphia; prior to the execution of this deed of trust, defendant J. W. King had become the owner of an equitable estate in fee in said lot of land, the defendant Fry retaining the legal title thereto, at the request of the said King. The deed of trust to Alderman, trustee, was executed by Fry at the request of King, who at the date of such request was the owner of an equitable estate in fee in said lot of land.

At its maturity default was made in the payment of the note executed by plaintiff, and payable to the order of the Gate City Building and Loan Association. By virtue of the deed of trust, executed by plaintiff, and securing this note, the holder thereof had the first lien on the land described in the complaint for the payment of the note. The said land has been sold under the power of sale contained in the deed of trust by the trustee who, pursuant to an order made herein, has paid the balance of the amount received therefor, after the payment of the note secured by the deed of trust, into the office of the clerk of the Superior Court of Guilford County. This sum of money is the subject-matter of this action; plaintiff contends that his deed to defendant Fry should be canceled and set aside for that the execution of the same was procured by fraud and undue influence, and that judgment should be rendered that said sum be paid to him as the owner of the equity of redemption in the land sold by the trustee in the deed securing the note payable to the Gate City Building and Loan Association; defendants, on the other hand, contend that said sum should be paid to Alderman, trustee, who claims under the deed from plaintiff to Fry, to be applied by him as a payment on the note executed by defendant King, payable to the Independence Indemnity Company of Philadelphia, and secured in the deed of trust executed by defendant Fry to said Alderman, trustee.

No facts are alleged in the complaint which show or tend to show that the execution of the deed by plaintiff to Fielding L. Fry was procured by fraud or undue influence; the only allegations in the complaint, pertinent to the consideration of the matters presented on this appeal, are to the effect that at the date of the execution of the deed Fielding L. Fry was the holder of a note secured by the deed of trust executed by plaintiff, conveying to the trustee the land conveyed by said deed to Fry, in fee simple; nor have defendants in their answers alleged any facts which rebut or tend to rebut a presumption, if any, from the relationship between plaintiff and the said Fry, with respect to said land, arising from the deed of trust, that the execution of said deed by plaintiff was procured by fraud or undue influence on the part of said Fry.

The first question, therefore, presented for decision upon this appeal is whether, in the absence of allegations in the complaint showing or tending to show that the execution of the deed by plaintiff to defendant Fry was procured by fraud or undue influence, and in the absence of such allegations in the answers, there was error in the judgment denying plaintiff's motion for judgment on the pleadings, and in sustaining defendants' demurrer, *ore tenus,* to the complaint for that same does not state facts sufficient to constitute a cause of action, upon which plaintiff is entitled to the relief demanded in his complaint. The question of law involved is whether a conveyance by deed of the grantor in a deed of trust to secure a creditor named therein, of the land conveyed thereby, to such creditor in fee, is presumed to be fraudulent, or the result of undue influence, solely because of the relation between the grantor and the grantee in the deed, with respect to the land conveyed thereby, arising out of the deed of trust. If there be such presumption, no allegations in the complaint of facts or circumstances showing or tending to show that the deed was procured by fraud or undue influence are required in order to constitute a cause of action to have such deed canceled and set aside, and the burden is on the grantee or those claiming under him to allege in the answer and to prove on the trial facts in rebuttal of the presumption; whereas, if there be no such presumption, in the absence of such allegations in the complaint, the same is subject to demurrer, for that it does not state facts sufficient to constitute a cause of action. It is manifest that the question here presented is of great practical importance, for its decision will doubtless affect title to lands in this State.

In *McLeod v. Bullard,* 84 N. C., 515, an instruction by the trial judge that, if while the relation of mortgagor and mortgagee subsisted between the parties to that action, the mortgagee purchased the equity of redemption of the mortgagor, the law presumes that such purchase was made fraudulently, and the purchase will not be sustained, unless the mortgagee shows by a preponderance of testimony the *bona fides* of the transaction was approved. In his opinion in that case *Ruffin, J.,* quotes with approval from the opinion of *Pearson, C. J.,* in *Whitehead v. Hellen,* 76 N. C., 99, as follows: "Courts of equity look with jealousy upon all dealings between trustees and their *cestuis que trust;* and if this mortgagor had, by deed, released his equity of redemption, we should have required the plaintiff to take the burden of proof and satisfy us that the man whom he had in his power, manacled and fettered by a mortgage and a peremptory power of sale, had without undue influence and for fair consideration, executed a release of his right to redeem the land." The principle thus stated has been frequently approved by this Court. It is well settled by many decisions that a conveyance of the equity of redemption by the mortgagor to the mortgagee is presumed to be fraudulent, and will be canceled and set aside unless the mortgagee shall allege and prove otherwise. The presumption arises from the relationship between the parties, which is fiduciary in its nature, and the burden is upon the mortgagee to rebut the presumption, both by allegation and proof. In *Lee v. Pearce,* 68 N. C., 76, *Pearson, C. J.,* after a full and exhaustive discussion in his opinion of the doctrine, says: "After a full consideration of the authorities, and 'the reason of the thing,' we are of opinion that only 'the known and definite fiduciary relations' by which one person is put in the power of another, are sufficient under our present judiciary system to raise a presumption of fraud, as a matter of law to be laid down by the judge, as decisive of the issue, unless rebutted."

There is no fiduciary relation between a creditor and his debtor, by which it can be said that the latter is in the power of the former. The relation arises out of contract; it ceases to exist upon the performance of the contract. Upon breach of the contract the creditor may recover judgment of his debtor for the amount of the debt; he is entitled to an execution upon the judgment, to be issued to the sheriff, who may levy upon and sell the property of the judgment debtor, after allotment of his personal property exemption, and homestead, as provided by law, for the satisfaction of the judgment. Nor does the fact that the debtor has conveyed property to a third person to secure his creditor establish any fiduciary relation between him and such creditor. The grantee in the deed of trust is a trustee for both debtor and the creditor, with respect to the property conveyed. The creditor can exercise no power over his debtor, with respect to said property, because of its conveyance to the trustee, with power to sell, upon default of the debtor. The power of the trustee is limited by the stipulations and provisions contained in the deed of trust executed by his grantor; neither in fact nor in law can it be held that there is such a fiduciary relation between a debtor and his creditor, secured in a deed of trust, that the principle upon which *McLeod v. Bullard, supra,* was decided is applicable to the relation between them.

We find no error in the judgment denying plaintiff's motion for judgment on the pleadings and sustaining defendants' demurrer, *ore tenus,* to the complaint. Plaintiff, having conveyed the land by deed to defendant Fry, and having failed to allege in his complaint a cause of action upon which he is entitled to have said deed canceled and set aside, has no interest in or claim to the funds now in the hands of the clerk of the Superior Court of Guilford County, arising from the sale of the land described in the complaint. The judgment directing that said funds be paid to defendant Alderman, trustee, to be applied as a payment on the note secured in the deed of trust executed by Fielding L. Fry to said Alderman, trustee, is

Affirmed.

W. W. PEARSALL AND INTERNATIONAL AGRICULTURAL CORPORATION v. ELIZABETH BLACK BLOODWORTH AND C. C. BRANCH, ADMINISTRATOR OF H. B. BLOODWORTH, DECEASED.

(Filed 30 November, 1927.)

Insurance, Life—Policies—Contracts—Change of Beneficiaries—Husband and Wife—Estates—Debtor and Creditor—Statutes.

While formerly an insolvent insured could not change, according to a provision in his policy, the beneficiary of his policy of life insurance from his estate to his wife, without consideration, against the rights of his creditors, this is now changed by our statute, C. S., 6464, providing that a policy of life insurance made payable to the wife, or after its issuance assigned and transferred, or in any way made payable to her, shall inure to her separate benefit.

CIVIL ACTION, before *Bond, J.,* at April Term, 1927, of PENDER.

The judgment in the cause states at length the facts out of which the controversy grows, said judgment being as follows:

This cause coming on to be heard this 29 April, 1927, before the undersigned, W. M. Bond, judge holding the courts of the Eighth Judicial District. The court, by consent of counsel for plaintiff and defendant, a trial by jury having been waived by all parties, finds the following facts:

1. That H. B. Bloodworth was, prior to 9 March, 1925, a resident of the county of Pender, State of North Carolina, and Elizabeth Black Bloodworth, one of the defendants in this action, was and is a resident of the county of Pender, State of North Carolina, and that C. C. Branch is a resident of the county of Pender, State of North Carolina, and the duly qualified and acting administrator of the estate of H. B. Bloodworth, deceased, and that the plaintiff was and is a resident of the county of Pender, State aforesaid, and the intervening petitioner is a foreign corporation doing business in the State of North Carolina.

2. That some time prior to 1 September, 1919, the said H. B. Bloodworth made application to the Jefferson Standard Life Insurance Company for a policy of insurance upon his own life, payable to his estate

as beneficiary, and that on the .... day of September, 1919, in accordance with his application, the Jefferson Standard Life Insurance Company issued policy No. 97616, in the face amount of $3,000 on the life of the said H. B. Bloodworth, payable to his estate as beneficiary, which said policy reserved the right to the insured of making change of beneficiary at any time at his option.

3. That following the depression generally over the country and during the period of deflation commencing in 1920, H. B. Bloodworth became financially involved, and was on 19 November, 1924, and for some time prior thereto, had been insolvent and unable to meet his debts, and such condition of insolvency continued until the date of his death.

4. That on or about 1 November, 1924, the said H. B. Bloodworth applied to the Jefferson Standard Life Insurance Company to have his wife, Elizabeth Black Bloodworth, made the beneficiary under said policy, instead of his estate, and that on 19 November, 1924, in accordance with his application, the beneficiary in said policy was changed from his estate to his wife, Elizabeth Black Bloodworth, in the form and manner provided in said policy for making change of beneficiary.

5. That the time of such change of beneficiary the said H. B. Bloodworth was insolvent and was unable to meet his obligations, and that the said H. B. Bloodworth knew of his then insolvent condition.

6. That no consideration passed at the time of the change of the beneficiary in said life insurance policy, and such change was made without the knowledge of the defendant, Elizabeth Black Bloodworth.

7. That H. B. Bloodworth had from time to time taken out insurance on his life with various insurance companies in a sum of approximately $20,000, and had in the policy or policies when and so issued provided for the payment, in the event of death, to his wife, Elizabeth Black Bloodworth.

8. That during the month of January, 1925, the plaintiff Pearsall sold and delivered to H. B. Bloodworth fertilizer supplies of the value of $458.51, all of which sum the said H. B. Bloodworth repeatedly promised to pay, and that on 7 March, 1925, the said H. B. Bloodworth executed and delivered his promissory note in the amount of $458.51, payable on 15 May, 1925, to W. W. Pearsall, or order, and that no part of the principal or interest of said note has been paid.

9. That on 23 April, 1924, the said H. B. Bloodworth did execute and deliver for value his promissory note to the International Agricultural Corporation, and on 5 December, 1924, the said H. B. Bloodworth did pay $100 on said note, leaving a balance due and unpaid of $301.59 with interest, which said sum the said H. B. Bloodworth repeatedly promised to pay, but after the payment of $100 failed to make any further payment of principal or interest on said note, and at the time of

his death was justly indebted to the plaintiff, International Agricultural Corporation, in the sum of $301.59, with interest.

10. That on 9 March, 1925, the said H. B. Bloodworth died intestate in the county of Pender, and that thereafter the defendant, C. C. Branch, qualified as administrator of his estate, and is now acting as such, and that thereafter the plaintiff filed due proof of his claim on said note with said administrator, but that the estate of the said H. B. Bloodworth is totally insolvent, and that the administrator has no funds and will obtain no funds from said estate sufficient to meet said obligation.

11. That after the death of the said H. B. Bloodworth the defendant, Elizabeth Black Bloodworth, filed due proof of loss with the Jefferson Standard Life Insurance Company, and said Insurance Company has paid to the said Elizabeth Black Bloodworth the sum of $2,756.36, being the face amount of said policy, less a loan on said policy, previously made by insured.

12. That thereafter the plaintiff in this action requested C. C. Branch, administrator of the estate of H. B. Bloodworth, to bring an action against the defendant, Elizabeth Black Bloodworth, on behalf of the creditors of his estate for the purpose of subjecting the proceeds of said life insurance policy to the said Elizabeth Black Bloodworth as aforesaid, to the payment of his debts; that the said C. C. Branch refused and declined to bring said action, and still refuses and declines to do so; that thereafter on or about 14 November, 1925, the plaintiff instituted the above-entitled action on behalf of himself and other creditors of the estate of H. B. Bloodworth, to subject the proceeds of said life insurance policy now in the hands of the said Elizabeth Black Bloodworth to the payment of the debts of the said H. B. Bloodworth, and, thereafter, the said International Agricultural Corporation, by petition, intervened.

13. That there existed at the date of the change of the beneficiary in the $3,000 policy issued by the Jefferson Standard Life Insurance Company, creditors of H. B. Bloodworth, whose claims exceed $3,000, and that such claims exceed the assets of the estate available to creditors in an amount in excess of $3,000.

Upon the foregoing facts and after hearing argument of counsel, the court being of the opinion that said transfer of beneficiary was ineffectual as to creditors:

It is therefore ordered, adjudged and decreed: That the act of H. B. Bloodworth, in changing the beneficiary in the policy of insurance on his life issued by the Jefferson Standard Life Insurance Company for $3,000 from his estate to his wife, Elizabeth Black Bloodworth, was and the same is hereby declared invalid, and the said Elizabeth Black

Bloodworth shall pay to the administrator of the estate of H. B. Bloodworth the sum of $2,756.36, paid by the Jefferson Standard Life Insurance Company to her because of said policy.

It is further ordered, adjudged and decreed, that W. W. Pearsall recover the sum of $458.51, with interest, and that the International Agricultural Corporation recover the sum of $301.59 with interest, and both sums shall be paid by the administrator out of the first moneys coming into his hands from this recovery, in full, because of the priority established by the plaintiff, W. W. Pearsall, and International Agricultural Corporation, as diligent creditors.

From the foregoing judgment the defendant appealed.

L. J. Poisson and J. G. McCormick for plaintiff.
K. O. Burgwin for defendant.

BROGDEN, J. Is the change of beneficiary from his estate to his wife, made by an insolvent husband, in an ordinary policy of life insurance providing for a change of beneficiary at the option of the insured, valid and effectual against creditors of such insolvent?

The question of the validity of the assignment of a policy of life insurance when the insured is insolvent was considered by this Court in *Burton v. Farinholt,* 86 N. C., 260. The Court held that a life insurance policy was a chose in action and became an integral part of the estate of the insolvent immediately upon the delivery of the policy, and therefore a voluntary assignment of the same was void as against creditors. The principle is thus expressed in the opinion: "Being indebted to a state of clear insolvency at the time of its voluntary assignment to his daughters, his act was fraudulent as to his creditors and void in law, whether made with an intent actually fraudulent or not. From the fact that he was at the time insolvent, and that his transfer to his daughters was without a valuable consideration, it results, as a conclusion of law, that the assignment was void as to his creditors. . . . If taken directly in their names and for their benefit, it would have been, *ab initio,* their property, and would never have constituted a part of their father's estate, upon the faith of which he could, and perhaps did, obtain credit, and that is the test."

There is a well recognized distinction in law between the assignment of a policy and a change of beneficiary, certainly where the policy itself delegates the power to change the beneficiary at the option of the insured. Thus in Joyce on the Law of Insurance, 2 ed., Vol. 4, sec. 2327a, the author says: "A distinction is made between an assignment and a change of beneficiary in that an assignment is the transfer by one of his rights or interest in the property, rests upon contract and generally requires the delivery of the thing assigned, while the right to change the beneficiary is the power to appoint which must be exercised in the manner specified in the contract." *Mutual Benefit Life Ins. Co. v. Swett,* 222 Fed., p. 200, Ann. Cas., 1917 B, 298.

The Supreme Judicial Court of Massachusetts considered the question in *Bailey v. Wood,* 202 Mass., 562. The Court declared that: "In the absence of any statute we think the prevailing opinion in the States is that where a policy of insurance is originally taken out in the husband's name and payable to his estate, a voluntary assignment, when insolvent, by him to his wife is void as to his creditors." A number of authorities are cited in support of this utterance, including *Burton v. Farinholt, supra.*

If the test is the right of a creditor to rely upon the policy as a basis of credit as suggested in the *Burton case,* then there might be a practical difference between an assignment and a change of beneficiary, because if a policy of insurance contains a provision permitting the insured to change the beneficiary at his option, it would seem clear that a creditor could not rely upon such a contract as a basis of credit. As to whether there is any difference between an assignment and change of beneficiary we do not decide, because, in our opinion, it is unnecessary to do so in the present case.

There is a statute in this State which determines the rights of the parties to this controversy. C. S., 6464, provides in part: "Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband, or by any other person, and whether the assignment or transfer is made by her husband or by any other person, inures to her separate use and benefit and to that of her children, if she dies in his lifetime." Under the plain provision of this statute it is entirely immaterial whether the wife becomes entitled to the proceeds through assignment or by mere change of beneficiary. The words of the statute "or in any way made payable to a married woman" are broad and comprehensive, and necessarily cover both methods of vesting in her the title to the proceeds of the insurance. C. S., 6464 was originally chapter 54, section 59, Public Laws 1899. The statute was passed several years after the decision in the *Burton case* and is controlling upon the question presented in the case at bar.

The construction which we have placed upon the statute is in accordance with the principle announced in *Bailey v. Wood, supra.* The statute under consideration in *Bailey v. Wood* is very similar to our own. The Massachusetts Court, in holding that the wife would be entitled to the proceeds of insurance assigned by an insolvent husband, states its conclusion thus: "There is a marked distinction, therefore, as to the right of a wife under this statute and the right of any other beneficiary. The right of the wife extends not only to policies expressed for her benefit when issued, but also to those which, after issue, are assigned or in any way made payable to her for her benefit, while the right of any other beneficiary is confined to policies expressed at the time of their issue to be for his benefit." The case of *Bailey v. Wood* has been cited with approval in many later cases, some of them being *Eldredge v. Ins. Co.,* 105 N. E., 361; *Tyler v. Treasurer and Receiver General,* 115 N. E., 300; *In re Simmons v. Griffin,* 255 Fed., 521.

We, therefore, hold, upon the facts presented, that the judgment pronounced in this case was erroneous, and the same is

Reversed.

A. B. WELCH ET AL. v. ANNIE A. WELCH ET AL.

(Filed 30 November, 1927.)

Estates—Sales—Contingent Interests — Infants — Guardian ad Litem—Process—Service—Statutes—Judgments — Irregularities — Innocent Purchaser.

Where in proceedings to sell lands affected with contingent interests the provisions of our statute, C. S., 1744, have been observed, the clerk of the Superior Court has appointed a guardian *ad litem* for contingent interests and for infant parties, the failure to serve summons on a minor is to be regarded as an irregularity that will not render the sale made by the commissioner appointed void and a nullity; and while it may on a proper showing be set aside as to all the parties, it is valid as to an innocent purchaser at the sale without notice of the irregularity; and on appeal to the Supreme Court, when this fact is not apparent, the case will be remanded for its ascertainment. C. S., 451, 483(2).

APPEAL by W. C. Owens from *Harding, J.,* at October Term, 1927, of MECKLENBURG.

On 2 July, 1924, the petitioners made a contract with the South Atlantic Land Company, Inc., by the terms of which the company agreed to sell for them a tract of land containing 15 acres; and on 14 August, 1924, the petitioners filed in the office of the clerk of the Superior Court a petition for an order of sale. They alleged that they and the defendants were owners and in possession of the land; that the defendants were minors; that the income from the land was barely sufficient to pay the taxes and other charges, and that a sale for reinvestment was desirable. C. S., 1744. They applied in writing for the appointment of a guardian *ad litem* for the infant defendants; also for the appointment of some discreet person to act as guardian *ad litem* and to file an answer for those who might in any contingency become interested in the land. The appointments were made and each guardian filed an answer after a summons had been issued and after service thereof had been accepted. The clerk then made an order appointing a commissioner to sell the land, and the commissioner thereafter filed a report of the several offers of purchase he had received for certain lots. On 6 October, 1924, the clerk adjudged that the offers be accepted, that the sales be confirmed, and that deeds be executed and delivered to the purchasers; and on 14 October, 1924, the special proceeding was approved and confirmed by the judge presiding in the judicial district. On 19 October, 1927, the defendant, Annie A. Welch, then twenty-two years of age, entered a special appearance by her attorneys and moved that all previous orders in the cause be set aside on the ground that the court had not acquired jurisdiction in that no summons had been issued or served on her or on any of the other defendants, all of whom were minors when the orders were made. Proper notices were issued, and W. C. Owens, one of the purchasers, upon petition and motion was made a party plaintiff and given leave to assert his rights and oppose the motion to vacate the judgment. The clerk found that no summons had been issued against any of the infant defendants; that the proceeding had been instituted by the issuance of a summons against the guardians *ad litem,* and that no money or notes for deferred payments had been turned over to him as directed by the order of sale. He thereupon concluded that his judgment was void and set aside the order of sale. Upon appeal Judge Harding held that the proceeding was void for want of service of process upon the infant defendants, adopted the clerk's findings of fact and dismissed the action. W. C. Owens excepted and appealed.

B. S. Whiting for appellant.
Preston & Ross and J. L. Delaney for appellees.

ADAMS, J. The appeal raises the two questions whether the clerk's judgment was void or irregular and if irregular whether the appellant was an innocent purchaser for value without notice.

Under the practice which prevailed before 1868 a judgment in a special proceeding would not be set aside upon the application of a minor who had not been served with process if a guardian *ad litem* had been appointed to defend his interests and in good faith had made a defense in his behalf. *Hare v. Hollomon,* 94 N. C., 14. It was the general practice, loose as it was common, to apply for the appointment of a guardian *ad litem* without serving the infant with process, the guardian, after appointment of course, usually accepting service and answering for his ward. *Cates v. Pickett,* 97 N. C., 21. As suggested in *Matthews v. Joyce,* 85 N. C., 258, this practice had long prevailed in the State and the power of appointment had been exercised without the issue of process against the infants, for the assigned reason that no practical benefit would result to them from such service because their interests were under the protection of the courts. *England v. Garner,* 90 N. C., 197.

But the process of appointment was changed by section 59 of the Code of Civil Procedure, which went into operation 24 August, 1868. This section was subsequently repealed (Laws 1870-71, ch. 233), and superseded by section 181 of The Code, sec. 406 of the Revisal, sec. 451 of the Consolidated Statutes. In cases decided soon after the adoption of the Code of Civil Procedure it was held that a guardian *ad litem* could not be appointed until process had been served on the minor. *Hyman v. Jarnigan,* 65 N. C., 96; *Turner v. Douglass,* 72 N. C., 127; *Moore v. Gidney,* 75 N. C., 34. To the same effect is the later case of *Young v. Young,* 91 N. C., 359. If process was served neither on the minor nor on his guardian the judgment was void. *Larkins v. Bullard,* 88 N. C., 35; *Stancill v. Gay,* 92 N. C., 462; *Perry v. Adams,* 98 N. C., 167; *White v. Morris,* 107 N. C., 92. In other cases it was held that the proceeding was irregular, but not void, in the absence of service on the minor, if process had been served on the guardian *ad litem.* "Mere irregularities in observing the provisions of the statute, not affecting the substance of its purpose, do not necessarily vitiate the action or special proceeding." *Ward v. Lowndes,* 96 N. C., 367, 378. In *Williamson v. Hartman,* 92 N. C., 239, it was said in reference to a motion to vacate the judgment that every irregularity will not justify this course, that some irregularities are unimportant, and that the question whether such motion should be granted must depend upon circumstances and their application to the particular case. In reference to the subject this statement was made in *Carraway v. Lassiter,* 139 N. C., 145, 154: "We have carefully examined the cases relied upon by petitioners and find that the Court has, in cases wherein the proceedings were instituted since the adoption of The Code, set aside judgments, etc., when no service of process was made upon the infants, and refused to do so when the infant was in court, notwithstanding irregularities in the proceeding. In *Moore v. Gidney,* 75 N. C., 34; *Gulley v. Macy,* 81 N. C., 356; *Young v. Young,* 91 N. C., 359; *Stancill v. Gay,* 92 N. C., 462, no summons was served on the infant defendant, guardians *ad litem* were appointed without personal service on the infants, and filed answers. This Court has in such cases invariably held that the court acquired no jurisdiction. When, however, personal service was made on the infants a contrary ruling has been made."

This was approved in *Hughes v. Pritchard,* 153 N. C., 135. There four of the defendants were infants under the age of fourteen years. They were not served with process as the statute requires, but their guardian *ad litem* filed an answer for them. There were other defendants, some adults, others under twenty-one, but over the age of fourteen. The judgment in a special proceeding was set aside as to the defendants who were under fourteen, there being no purchaser for value, the Court saying: "Proceeding now to consider the grounds upon which the learned counsel of the plaintiffs seek to sustain the finality of the judgment in the special proceeding for partition, and the freedom from impeachment by these infants of those proceedings, it is contended that as some of the defendants to that proceeding, adults as well as infants over fourteen years of age, having the same interest in the litigation as the infants under fourteen years of age, were properly served with summons, the court had jurisdiction to appoint, and did appoint, a guardian *ad litem* for all the infant defendants and, he having answered, the infants under fourteen years of age are concluded by the judgment of the court as effectually as if they had been personally served; and this contention is rested upon the provisions of section 406, Revisal, Code, sec. 181; Bat. Rev., sec. 59, ch. 17; Acts of 1871-72, ch. 95, sec. 2. This result, it is contended, would follow notwithstanding there was a failure to serve the summons upon these infants in the manner prescribed by section 440(2) of Revisal. In its final analysis, this contention means that no service of summons on infants under fourteen years of age need be made where there are other persons defendant, upon whom proper service has been made; and that the court may appoint a guardian *ad litem* for them and render judgment which will effectually conclude them. This contention, if sound, would require the prescribed service upon infants under fourteen years of age to be made only in those civil actions or special proceedings where such infants are the sole defendants. Such a construction of the statute we do not find supported by any decision of this Court, nor is it in accord with the adjudications of other courts." . . . "Construing the two sections together, we hold that section 440(2), Revisal, prescribes the manner of service upon infants under fourteen years of age, and that section 406, Revisal, authorizes the appointment of guardians *ad litem* and that, as has been uniformly held in this State, where a defective or incomplete service upon such infants has been made, but a guardian *ad litem* has been appointed in substantial compliance with the requirements of section 406, Revisal, and the court has proceeded to judgment in the action or proceedings, such defective or incomplete service upon the infants constitutes but an irregularity, which renders the judgment not void, but voidable only, which cannot be collaterally impeached, and which will not be vacated or set aside solely for such irregularity, when the rights of bona fide purchasers for value without notice have intervened. The reasoning which induced the holding that such defects rendered the judgment merely irregular, are stated with great force and clearness by *Ruffin, J.,* in speaking for this Court in *Sutton v. Schonwald,* 86 N. C., 198, which case has since been many times cited with approval." See, also, *Dudley v. Tyson,* 167 N. C., 67, and *Rawls v. Henries,* 172 N. C., 216.

The indifference with which the interests of minors are dealt with has in many instances become a menace to the protection of their property; and for this reason it may not be inappropriate again to direct attention to the statute providing for the appointment of guardians *ad litem.* (1) In all actions and special proceedings defendants who are infants, idiots, lunatics, or persons *non compos mentis,* whether residents or nonresidents of the State, must defend by their general or testamentary guardian, if they have one within the State. (2) If they have no such guardian in the State and have been summoned (P. L. 1927, ch. 66; C. S., 483, sec. 2), the court in which the action or special proceeding is pending, upon motion of any of the parties, may appoint a guardian *ad litem* to defend in behalf of such infants, idiots, lunatics, or persons *non compos mentis.* (3) If the cause is a civil action the guardian so appointed must file his answer to the complaint within the time required for other defendants, unless the time is extended. (4) If the cause is a special proceeding a copy of the complaint, with the summons, should be served on him. (5) After twenty days notice of the summons and complaint in the special proceeding, and after answer filed in the civil action the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon said infant, idiot, lunatic, or person *non compos mentis.* C. S., 451. Construing this section *Bynum, J.,* observed: "When the infant defendants, in a civil action or special proceeding, have no general or testamentary guardian, before a guardian *ad litem* can be appointed, a summons must be served upon such infants and a copy of the complaint also be served or filed according to law. After the guardian *ad litem* is thus appointed in a special proceeding, a copy of the complaint, with the summons, must be served on the guardian. All this does not give the court jurisdiction to proceed at once in the cause; for it is further provided, that not until after twenty days notice of said summons and complaint, and after answer filed, can the court proceed to final judgment and decree therein." *Moore v. Gidney, supra.*

In the case before us the trial judge, affirming the clerk's findings of fact, held that the sale and decree of confirmation were void for want of service of one of the infants; that none of the parties is bound by the judgment, and that the appellant acquired no rights by virtue of his deed. The proceeding was extremely irregular, but in our opinion the judgment is not void. By reason of such irregularity the judgment may be vacated as to all parties, unless the appellant is an innocent purchaser for value without notice. If he is, his title will be protected. As to this question the record is indefinite. The judgment declaring the proceeding void is reversed and the cause is remanded that it may be determined upon findings of fact whether the appellant is an innocent purchaser for value without notice. *Gulley v. Macy,* 81 N. C., 356, 367; *Sutton v. Schonwald,* 86 N. C., 198, 204; *England v. Garner, supra; Carraway v. Lassiter, supra; Harris v. Bennett,* 160 N. C., 339, 346.

Reversed and remanded.

IN RE WILL OF MARY A. SUGG.

(Filed 7 December, 1927.)

1. **Jury — Polling Jurors — Courts — Constitutional Law—Constitutional Right.**

   Upon the coming in of the verdict in a civil action, either party to the action has the constitutional right to have the jury polled before accepting the verdict as a unanimous one. Const. of N. C., Art. I, sec. 19.

2. **Same—Verdict Taken by Clerk—Agreement of Counsel—Judgments—Courts—Clerks of Court—Terms of Court.**

   Where in a civil action upon consent of the parties the trial judge instructs the clerk to take the verdict in his absence, and later the clerk receives the verdict, apparently unanimous, and upon request of a party to poll, one of the jurors answers the issue, "Yes, but—," and upon again being questioned by the clerk answers "Yes" without qualifying it: *Held,* the subsequent setting aside of the verdict by the judge upon his finding from the affidavit of the juror, that his answer was in the negative, and he had otherwise answered to avoid a mistrial, as the other eleven jurors were of an opposite opinion, is not erroneous. As to the effect of an agreement of the parties that the judgment should thus be taken after the expiration of the term of court, *quere?* the matter not being presented by the exceptions on this appeal.

3. **Same—Wills—Caveat—Parties.**

   While generally there are no adversary parties in proceedings to caveat a will, there are certain exceptions applying to particular instances, among them being the right of the parties to have the jury polled before accepting the verdict.

4. **Same—Waiver.**

Where a party to an action requests the polling of the jury before accepting the verdict, it is the duty of the judge to accede, and the waiver of a party of his right to have the judge receive the verdict, in not requiring his presence, does not include the waiver of his right to have the jury polled, and when the verdict is thus received by the clerk, the objecting party has the right to have the clerk poll the jury upon his request.

5. **Verdict—Agreement of Parties—Consent—Clerks of Court.**

The agreement of the parties to the litigation that the clerk may take the verdict of the jury, acquiesced in by the judge, is valid.

6. **Same—Duty of Clerk.**

Where the verdict of the jury, apparently unanimous, is received by the clerk in the absence of the judge under an agreement of the parties, and a juror, upon being polled intimates that his mind had not accepted it, and further states that he would explain if he thought he could do so in the absence of the judge, it is the duty of the clerk to correctly inform the juror upon the matter, and when he has failed to do so, the subsequent setting aside of the verdict by the judge upon a finding, sustained by the evidence, is not error of law.

7. **Verdict—Jurors—Polling Jurors — Unanimous Verdict — Verdict Set Aside—Impeachment—Affidavit of Juror.**

Where the judge has set aside a verdict of the jury, received by the clerk, upon an affidavit of a juror to the effect that he was under a misapprehension as to his right to disagree with the answer given, and there is no exception to the introduction of the affidavit: *Held*, the affidavit so considered was not in impeachment of the verdict, but an explanation of the juror's error therein.

APPEAL by propounders from order of *Finley, J.*, dated 15 April, 1927. From MECKLENBURG. Affirmed.

This is a proceeding for probate of paper-writing as the last will and testament of Mary A. Sugg.

The issues were submitted to a jury at March Term, 1927, of the Superior Court of Mecklenburg County. Answers to these issues were received by the clerk, as the verdict, in the absence of the judge pursuant to agreement of counsel. Caveators thereafter moved that said answers be set aside and that a new trial be ordered. Pursuant to agreement of counsel theretofore made, this motion was heard after the expiration of the March Term.

From order setting aside the answers to the issues, and ordering a new trial, as a matter of law, and not in the exercise of discretion, propounders appealed to the Supreme Court.

Mason & Mason, P. C. Whitlock and Thaddeus A. Adams for propounders.

Cansler & Cansler and Redd & Small for caveators.

CONNOR, J. This proceeding was called for trial during the last week of the March Term, 1927, of the Superior Court of Mecklenburg County at which Judge Finley presided. After introduction of evidence by both propounders and caveators, argument of counsel and the charge of the court, the issues were submitted to the jury about 10 o'clock, on Friday night, 18 March, 1927.

At 12 o'clock on Saturday morning the jury had not returned a verdict; they were still deliberating upon the issues submitted to them the night before. The judge thereupon intimated to counsel that he desired to go to his home at Wilkesboro to spend the week-end, and that in order to do so, he must leave Charlotte at 2 o'clock p.m. In deference to this intimation, it was agreed by counsel for both propounders and caveators, that the judge should leave the court, and that in his absence the clerk should take the verdict. It was further agreed that motions and appeal entries could be made either within or without the term, and that judgment should be signed by the judge thereafter. Pursuant to this agreement, which was made known to the judge, he instructed the clerk as follows:

"That if the jury did not agree before, to let them deliberate until about 4 o'clock, and for the clerk, about that time to call upon them and inquire what progress they were making, and if they reported progress, to let them remain and deliberate as much longer as the clerk in his judgment should think best, but if they reported that they were making no progress, and that it was not possible for them to agree, for him to withdraw a juror, make a mistrial and discharge the jury for the term, that day being the end of the term, but if they did agree, for the clerk to take the verdict, in the absence of the court."

This instruction to the clerk was given by the judge in the presence of counsel and with their consent. The judge thereafter left the court, and at 2 o'clock p.m. left Mecklenburg County for his home at Wilkesboro.

Pursuant to his instructions, the clerk called upon the jurors, in the jury room, about 4 o'clock p.m., and upon being informed by them that they were making progress in their deliberations, and would probably agree upon a verdict in a short time, he left them. Shortly before 5 o'clock p.m. the jurors came into the court room and announced that they were ready to return their verdict. The clerk said, "Gentlemen of the jury, have you agreed upon your verdict?" The foreman replied, "We have." Whereupon the clerk said, "So say you all?" The foreman and several of the jurors thereupon nodded assent. The foreman handed to the clerk the issues, with answers favorable to the propounders.

Counsel for caveators thereupon demanded that the jury be polled; counsel for propounders objected, on the ground that under the agreement pursuant to which the clerk was authorized to take the verdict in the absence of the judge, the clerk had no right to poll the jury. Notwithstanding this objection, the clerk proceeded to poll the jury, as demanded by counsel for caveators. To this the propounders excepted.

When the name of the juror, J. R. Cunningham, which appeared first on the list of jurors, was called, the clerk asked him, "Is this your verdict?" He replied, "Yes, but—." After hesitating for a short time, the juror said, "Well, I have something to say concerning my decision, but I guess I can't say anything because the judge is not here." The clerk repeated his question to the juror, "Is this your verdict?" The juror answered, "Yes."

The poll of the jurors was continued, and each of the other jurors, in response to the clerk's question, replied "Yes." The clerk then discharged the jury and recorded the answers to the issues as the verdict of the jury.

Immediately after the jury was discharged, the juror Cunningham, upon being interrogated by a reporter for a local newspaper, who was present at the time, as to what statement he wished to make to the court, said, "Well, I did not want to vote the way I did, but I had to, as they (the other jurors) were all against me. I thought, and still think, that the will was secured by improper influence, but a mistrial is a great expense to the county."

In addition to the foregoing facts, which the judge found upon the hearing of caveator's motion to set aside the answers to the issues, as recorded by the clerk, he further found from the affidavit of the juror Cunningham that if the judge had been present when the jurors were polled, he would have stated to the judge that he was still of the opinion that Mrs. Sugg did not have a good mind, and that she had been unduly influenced by Mrs. Fayssoux in making her will, but that if with this statement before the court, it was agreeable to the judge for the juror to vote to uphold the will in spite of that opinion, he was willing to do so, in order to give a unanimous verdict.

Upon his findings of fact, as herein set out, the judge was of opinion that the juror Cunningham did not unqualifiedly assent to the verdict as and when rendered in open court, and thereupon, as a matter of law, allowed the motion of counsel for caveators that the verdict be set aside and a new trial ordered.

The question, whether either party to civil actions, tried in the courts of this State, has the right to have the jurors polled before a verdict tendered by them is accepted by the court, as the verdict in the action, was first presented for decision by this Court in *Smith v. Paul,* 133

N. C., 66. *Walker, J.,* writing the opinion for the Court in that case, cites *S. v. Young,* 77 N. C., 498, in which it had been held that in a criminal action, both the defendant and the solicitor for the State have the right to demand that the jury be polled before its verdict is accepted, in order that it may be ascertained whether or not such verdict is unanimous. It is said in the opinion in the latter case that the right of the judge to poll the jury is immemorial, and had never been questioned, so far as the Court was informed. Upon an examination of the principles upon which that case was decided, this Court held that they were applicable to a decision of the question then under consideration. It was thereupon held that either party to a civil action is entitled to have the jury polled. In *Culbreth v. Borden Mfg. Co.,* 189 N. C., 208, *Smith v. Paul, supra,* is cited as determinative of this question. It was there held that the losing party in a civil action may demand a polling of the jury upon the return of the verdict, as a matter of right. Const., Art. I, sec. 19. The fact that this is a proceeding for probate in solemn form of a paper-writing as a last will and testament, and not strictly speaking a civil action, to which there are adverse parties, does not affect the right of either the propounder or the caveator to have the jury polled, upon demand, made in apt time. It has been held by this Court that in a proceeding of this kind, both propounders and caveators are parties, for certain purposes. *In re Will of Brown, ante,* 583; *In re Mann,* 192 N. C., 248. Each is entitled as a matter of right to have the issues which are determinative of the proceeding answered by a jury, consisting of twelve jurors. The issues so answered constitute a verdict, which has been defined as the unanimous decision made by a jury and returned to the court. *Sitterson v. Sitterson,* 191 N. C., 319. This is a substantial right, of which neither can be deprived. The right to poll the jurors is recognized, in order that it may be ascertained whether or not the verdict as tendered is the unanimous decision of the jurors. If it is found by such poll that one juror does not then assent to the verdict as tendered, such verdict cannot be accepted, for it is not as a matter of law the unanimous decision of the jury. *Owens v. R. R.,* 123 N. C., 183.

Upon demand of either party to an action, civil or criminal, or to a proceeding in which an issue has been submitted to a jury, that the jurors be polled, it is the duty of the judge to cause the poll to be made. The poll is usually made, under the direction of the judge, and in his presence, by the clerk; when the parties have agreed that the verdict may be taken by the clerk in the absence of the judge, it cannot be held that either party by such agreement has waived any of his rights with respect to the taking of the verdict, except the right to have the judge present. We therefore hold that upon the facts found by the judge, and set out upon this record, caveators had not, by their agreement that the clerk might take the verdict, in the absence of the judge, waived their right to have the jury polled, upon demand in apt time. Upon such demand, it was the duty of the clerk to poll the jury, and propounders' exception to his action in that respect is not sustained. It has been expressly held in this State that by agreement of counsel for parties to a civil action, the clerk can represent the judge, and in his absence take the verdict of the jury. *Barger v. Alley,* 167 N. C., 362; *Ferrell v. Hales,* 119 N. C., 199.

It is apparent from the facts found by the judge that the juror Cunningham did not assent to the verdict as accepted by the clerk. He qualified his answer in response to the poll by the statement to the clerk that he wished to say something, but could not do so because of the absence of the judge. He should have been instructed by the clerk that notwithstanding the absence of the judge, he could and should make any statement he desired with respect to his answer to the question addressed to him by the clerk. If he had been thus instructed, he would have said that he did not assent to the answers to the issues. Upon this statement by the juror, the clerk should not and would not have accepted the verdict then tendered by the foreman of the jury, nor would he have discharged the jury at that time, without ordering a mistrial as he had been instructed by the judge to do, upon his finding that the jurors could not agree.

The affidavit of the juror, from which the judge found what he would have said had the judge been present, when the jurors were polled, was not offered to impeach the verdict, but as explanatory of the juror's answer to the clerk's question, before the verdict was accepted by him. There is no exception in the record to this affidavit, or to any of the findings of fact, upon which the order was made.

Upon the facts found by the judge and fully set out in the record, propounders' assignment of error, based upon the exception to the order, is not sustained.

We do not consider the question suggested in the argument and discussed in the briefs, as to the validity of the agreement, pursuant to which the judge not only left the court, but also left the county, prior to the taking of the verdict. This question is not presented on the record. As pertinent thereto, however, reference may be had to the words of *Clark, C. J.,* in *Barger v. Alley,* 167 N. C., 326, as follows:

"It is not unusual to agree that judgment may be entered in vacation as of the term. It is also not unusual to agree that the clerk may take the verdict in the absence of the judge. It is rather unusual to agree for the clerk to accept a verdict after the judge has left the court. It is a practice not to be commended. It may lead on occasions to serious inconvenience, for strictly speaking the court ends when the judge leaves."

The question as to whether the verdict was void because it was received after the judge had left the county, and therefore after the end of the term, is not necessarily presented upon this record for decision. There is no error in the judgment upon the facts found by the judge; we do not affirm the judgment upon the ground that the agreement of counsel that the judge should leave the court before the verdict was rendered, was not sufficient to continue the term, in the absence of the judge, until the verdict was rendered or the jury discharged. We affirm the judgment upon the finding of fact that one of the jurors did not assent to the verdict tendered by the foreman at the time same was received by the clerk.

Affirmed.

A. L. LANGLEY AND WIFE v. STALEY HOSIERY MILLS COMPANY.

(Filed 7 December, 1927.)

1. **Nuisance—Waters—Pollution of Stream—Property Rights—Damages—Actions.**

Where the emptying of dye stuffs from a hosiery mill of private ownership, pollutes the stream so as to invade the rights of a lower proprietor on the stream, and also causes the spring on the owner's land, from which he gets his family supply of water, to be unhealthy, and also causes an offensive smell to arise from the plaintiff's pond amounting to a nuisance, and an invasion of his property rights, an action for damages arises to him, the amount to be ascertained by the jury at the time of the trial.

2. **Same—Permanent Damages—Agreement of Parties.**

Under the facts of this case: *Held*, it not appearing that the damages sought to be recovered arise from permanent conditions, permanent damages are not recoverable, but damages on separate actions accruing from time to time during the continuance of the nuisance may be recovered in the absence of the defendant's agreement for the assessment of permanent damages.

APPEAL by defendant from *Finley, J.*, at July Term, 1927, of RANDOLPH. New trial.

The evidence tended to show that the plaintiffs owned a farm of eighty-nine acres on Brush Creek, in Randolph County; that a pond of water, covering a few acres, and a grist mill had been maintained there for several years; that about seventy-five feet below the dam there was a spring, water from which was used by the plaintiffs for drinking and domestic purposes; that the defendant had a hosiery mill at Staley, from which dye water, after draining through settling pits, flowed down a dry branch into Brush Creek and into the plaintiff's pond; that the pond had a green scum on it when the water was low, and that offensive odors therefrom annoyed the owners and occupants of the dwelling. The action was prosecuted for the recovery of damages resulting, it was alleged, from a nuisance created by the defendant. The following verdict was returned:

1. Are the plaintiffs the owners of the land described in the complaint? Answer: Yes.

2. Has the defendant unnecessarily or unreasonably polluted Brush Creek, as it flows through plaintiffs' premises, as alleged in the complaint? Answer: Yes.

3. What damages, if any, have plaintiffs sustained by reason thereof, as alleged in the complaint? Answer: $1,200.

Judgment for the plaintiff, and appeal by the defendant on errors assigned.

C. N. Cox and Brittain, Brittain & Brittain for plaintiffs.
J. A. Spence and H. M. Robins for defendant.

ADAMS, J. In response to the third issue the jury awarded the plaintiff permanent damages; and to the proposition that upon the pleadings, the evidence, the record, permanent damages could not be awarded the principal exceptions are addressed. Whether these exceptions should be sustained is the question for decision.

The jury was instructed, in accordance with the rule approved in *Brown v. Chemical Co.,* 162 N. C., 84, that incidental benefits accruing to the party injured cannot be set off against damages resulting from the alleged nuisance, because such party cannot be required to accept indemnity in any manner other than that provided by law; but that when a nuisance operates as a partial taking of property, any resulting benefit peculiar to the owner may be considered in mitigation of damages. This was followed by an instruction in reference to the assessment of permanent damages under the rule which also is given in the case just cited. It was under this rule that permanent damages were assessed by the jury.

When the case we have cited was tried in the Superior Court the second time permanent damages were allowed, and on appeal the defendant took the position that it was not a case in which an award of permanent damages was permissible. On this point it was said: "As an original or independent proposition, the Court is not prepared to differ with defendants' view that the cause is not one permitting the award of permanent damages as a matter of right. The cases in which that principle has been thus far allowed to prevail in this State are those where it was expressly established by statute or where the injuries arose from structures or conditions permanent in their nature, and their continued maintenance was protected and guaranteed by the statutory power of eminent domain, as in case of roads and railroads, or because the interest of the public in this continued existence was of such an exigent nature that the right of the individual owner was of necessity and to that extent subordinated to the public good. See cases *Harper v. Lenoir,* 152 N. C., 723; *Geer v. Durham Water Co.,* 127 N. C., 349; *Parker v. R. R.,* 119 N. C., 677; *Ridley v. R. R.,* 118 N. C., 996."

In a later case against the same defendant (*Webb v. Chemical Co.,* 170 N. C., 662), the plaintiff appealed, assigning for error the judge's refusal to submit an issue for permanent damages, and it was held that the case was not one of those in which, at the election of the plaintiff, such an issue must be submitted, *Hoke, J.,* remarking: "In some cases on this subject it has been held that, when one erects a substantial building or other structure of a permanent character on his own land which wrongfully invades the rights of an adjoining proprietor by the creation of a nuisance or trespass, the injured party may 'accept or ratify the feature of permanency and sue at once for the entire damage.' *Chicago Forge and Bolt Co. v. Sanche et al.,* 35 Ill. Ap., 174. But in cases strictly of private ownership the weight of authority seems to be that separate actions must be brought for the continuing or recurrent wrong, and plaintiff can only recover damages to the time of action commenced. In this State, however, to the time of trial. *Ridley v. R. R.,* 118 N. C., 996, *supra; Adams v. R. R.,* 110 N. C., 325; *Aldwood v. City,* 153 Mass., 53; *Mayor v. Nashville, supra; Brewing Co. v. Compton,* 142 Ill., 511; *Schloss, etc., Iron and Steel Co. v. Mitchell,* 161 Ala., pp. 278-286."

In cases of private ownership an issue for permanent damages may be submitted by consent of the parties. *Morrow v. Mills,* 181 N. C., 423; *Brown v. Chemical Co., supra.* But we do not find in the record before us any sufficient evidence of the defendant's consent to this effect. His Honor said that he understood this to be the agreement; but there is no finding that the defendant consented, and its counsel insists that it did not. The charge is in support of his Honor's understanding; the third issue is not inconsistent with the defendant's position. In this state of the record a new trial will be awarded.

New trial.

AILEEN MILLS, INC., v. NORFOLK-SOUTHERN RAILROAD COMPANY.

(Filed 7 December, 1927.)

Carriers—Railroads—Side-Tracks—Repairs—Damages—Contracts.

Where a railroad company has constructed a side-track upon the lands of a milling corporation without an order of the Corporation Commission to do so, C. S., 1044, or an agreement with the owner to keep the track in repair, for the exclusive benefit of the owner in unloading its coal from an elevation or chute, and the same has become dangerous in placing the cars for unloading, the railroad company is not liable for damages in an action to recover the cost of such repairs expended by the owner, upon an agreement that thereby his action would not be prejudiced. The effect of an order by the Director General of Railroads under war control discussed by plaintiff, but not presented by the record or decided in this appeal.

APPEAL by plaintiff from *Schenck, J.,* at April Term, 1927, of MONTGOMERY. Affirmed.

Action to recover of defendant a sum of money expended by plaintiff for repairs to a side-track located on plaintiff's property, and also to recover damages resulting from the refusal of defendant to make said repairs.

This side-track includes a trestle, from which cars loaded with coal and shipped to plaintiff are unloaded; the trestle and the side-track were constructed and are used for the convenience of plaintiff, in the operation of its factory.

From judgment of nonsuit at the close of the evidence, upon motion of defendant, plaintiff appealed to the Supreme Court.

R. T. Poole, T. W. Bruton and Walter Clark for plaintiff.
Armstrong & Armstrong for defendant.

CONNOR, J. Defendant corporation is a common carrier of freight and passengers for hire, and as such is engaged in business in the State of North Carolina; it owns and operates a line of railroad, running through the town of Biscoe, in said State.

Plaintiff corporation owns and operates a factory or mill in the town of Biscoe, for the manufacture of cotton goods; its factory or mill is located on the west side of defendant's line of railroad in said town of Biscoe.

At the date of the commencement of this action, and for many years prior thereto, there was a side or spur track running from defendant's main line of railroad to and on plaintiff's property; this side-track was constructed and used for loading and unloading cars placed thereon by defendant for the convenience of plaintiff in the operation of its factory. It includes a trestle from which cars loaded with coal shipped to the plaintiff are unloaded. This side-track, according to defendant's blue print, from the point at which it leaves the main line to its end on plaintiff's property, is seven hundred and eighty feet in length; it is approximately four hundred and fifty feet on plaintiff's property. The trestle is altogether on plaintiff's property, and is used exclusively for unloading cars containing coal shipped to plaintiff, to be used in operating its factory.

Some time prior to the commencement of this action the said side-track and trestle were in need of repairs; it was not safe to move cars on said side-track and trestle for this reason. Defendant notified plaintiff that it would not move cars on the side-track, or place them on the trestle until same had been repaired. A controversy thereupon arose between plaintiff and defendant with respect to which of them should pay for the repairs. It was agreed that plaintiff should cause the repairs to be made without prejudice to its contention that defendant was liable for the cost of the repairs. Plaintiff has expended the sum of $408.85 for said repairs, and now demands judgment in this action that it recover said sum of defendant; it also demands judgment that it recover of defendant the sum of $56.65, upon its allegation that it paid out this sum for drayage during the time defendant refused to place cars upon the side-track and trestle.

There was no evidence upon the trial of this action tending to show that defendant or its predecessor had contracted, orally or in writing, to maintain the side-track or the trestle in such condition that cars could be moved or placed thereon, with safety; nor was there evidence tending to show that said side-track or trestle was constructed pursuant to an order of the Corporation Commission of North Carolina as authorized by statute. C. S., 1044. In the absence of a contract by which defendant was obligated to maintain said side-track and trestle, or of an order of the Corporation Commission made under legislative authority, defendant cannot be held liable to plaintiff for the cost of making repairs, although necessary, upon the side-track or trestle located on plaintiff's property, and used exclusively for plaintiff's benefit. The evidence is all to the effect that the sum which plaintiff seeks to recover in this action was expended in making repairs upon the trestle, which is used exclusively for the benefit of plaintiff.

It is suggested in the brief filed for plaintiff in this Court that defendant is liable to plaintiff for the amount expended for repairing the trestle by reason of orders of the Director General of Railroads, issued during Federal control. No evidence was offered at the trial in support of this suggestion. Nor is there any allegation in the complaint that

defendant is liable by reason of said orders. Whether defendant is liable for the repairs made to the trestle, as part of the side-track, by reason of orders issued by the Director General of Railroads, is not presented or decided on this record. Upon this record the judgment is
Affirmed.

V. B. SHORT v. LAFAYETTE LIFE INSURANCE COMPANY.

(Filed 7 December, 1927.)

Insurance, Life—Principal and Agent—Policies—Application—Representations—"Good Health"—Fraud—Collusion.

Where the application for a policy of life insurance has been signed in blank, and delivered to the agent of the insurer, with the information that the insured had not been well, and the agent agreed that an examination by a physician need not be made, and the policy has been issued, at the death of the insured the policy may not be avoided on the ground that the application had falsely stated that the insured was then in good health, when no fraud or collusion is shown against the insurer by the agent or the insured, the act of the agent in so doing being within the scope of his employment.

APPEAL by defendant from *Townsend, Special Judge,* at May Term, 1927, of GASTON. No error.

The following verdict was returned:

1. Did the insured falsely represent the condition of her health in her application upon which the policy of insurance was issued? Answer: No.

2. Did the defendant issue and deliver said policy of insurance with the knowledge of the condition of insured's health? Answer: Yes.

3. In what amount, if any, is defendant indebted to the plaintiff? Answer: $498 with interest.

Bismark Capps for plaintiff.
Ernest R. Warren and Mangum & Denny for defendant.

ADAMS, J. This is an action for the recovery of the amount alleged to be due on a policy of life insurance. The insured was Effie Short; the beneficiary is the plaintiff, her surviving husband. The defense interposed was predicated upon false representations said to have been made by the insured in her application for the policy. According to the application she was in good health and had not recently been sick. The plaintiff admitted that the insured had not been well, but he testified that he gave this information to the defendant's agent; that the application was signed in blank, and that the agent agreed to write the policy without a physician's examination. The pleadings and the testimony presented issues of fact which were submitted to the jury and answered against the defendant.

The exceptions on which the appellant relies relate to the denial of his motion for nonsuit and to an instruction given the jury. The testimony of the witnesses was conflicting, and that which was offered by the plaintiff was sufficient to sustain the verdict; for this reason the motion to dismiss the action could not properly have been granted. *Rush v. McPherson,* 176 N. C., 562; *Lindsay v. Lumber Co.,* 189 N. C., 118.

The instruction complained of was as follows: "Upon that second issue, I charge you that the knowledge of the agent would be the knowledge of the company unless you find that the agent, with the knowledge and consent of the insured in this case, was attempting to practice fraud upon the company. The knowledge of the agent, if there was no attempt to practice fraud, would be under the law the knowledge of the company."

There was evidence that the agent knew of the ill health of the insured when the application was taken; the agent's knowledge will therefore be imputed to the company and prevent it from avoiding the contract on the ground of false warranty. This position is approved in *Insurance Co. v. Grady,* 185 N. C., 348, 353: "Another principle recognized in this jurisdiction and pertinent to the inquiry is that, in the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for the same. *Gardner v. Ins. Co.,* 163 N. C., 367; *Fishblate v. Fidelity Co.,* 140 N. C., 589; *Grabbs v. Ins. Co.,* 125 N. C., 389; *Follette v. Accident Assn.,* 110 N. C., 378; *Connecticut Indemnity Assn. v. Grogan's Admr.,* 52 S. W., 959; *McElroy v. British American Assur. Co.,* 94 Fed., 990; *Northwestern Life Assur. v. Findley et al.,* 68 S. W., 695; *Germaine Life Ins. Co. v. Koehler,* 63 Ind. App., 188."

The following additional authorities may be consulted: *Collins v. Casualty Co.,* 172 N. C., 543; *Robinson v. B. of L. F. & E.,* 170 N. C., 545; *Horton v. Ins. Co.,* 122 N. C., 498; *Bergeron v. Ins. Co.,* 111 N. C., 45.

No error.

STATE v. C. T. BLAKENEY.

(Filed 7 December, 1927.)

Evidence — Hearsay — Criminal Law — Burnings — Motive—Banks and Banking—Officers—Cashier.

Where the cashier of a bank is indicted for the felonious burning of the building in which the bank conducted its business and kept its records, and to show motive the State relies upon evidence tending to show the defendant's defalcation and his purpose to conceal it by the destruction of the bank's ledger wherein the information should have been found by the State Bank Examiner, then examining the defendant's books: *Held*, testimony of the bank examiner to the effect that a statement of the bank handed to him by another official of his department supplied the information by which he ascertained the defalcation of the defendant, is incompetent as hearsay, its genuineness and accuracy not having been testified to by any competent witness, and its admission is reversible error in the absence of admissions or evidence rendering it competent. The exceptions to the rule of hearsay evidence stated by STACY, C. J.

APPEAL by defendant from *Schenck, J.*, at April Term, 1927, of CABARRUS.

Criminal prosecution tried upon an indictment charging the defendant with the felonious burning of a building on 8 April, 1926, used at the time by the Bank of Midland in carrying on its banking business.

The evidence was largely circumstantial, but quite sufficient to carry the case to the jury. It was the theory of the State that the defendant, cashier of the Bank of Midland, was short in his accounts, and that he set fire to the building in order to destroy the records of the bank and thus cover up or hide his irregularities or defalcations.

At the time the fire occurred an audit of the bank was being made by W. S. Coursey under the direction of State Banking Department; and, on the trial, he was permitted to testify, over the defendant's objection, as follows:

"Q. State what the result of your investigation disclosed as to the condition of the bank. A. I can't answer that because the general ledger of the bank was destroyed; therefore, some information which I carried on my balance sheet could not have been gotten from the general ledger or from any record of the bank, and was obtained from the records in Raleigh. I got it from a public record in Raleigh; examination of the Bank of Midland by a State bank examiner; this was a State record; that was the amount of the deficit on 6 March. Got that from the bank examiner's report in the office in Raleigh.

"Q. Did you go to Raleigh and get it yourself? A. It was handed to me by Mr. Latham, the chief bank examiner.

"Q. Where? A. I don't remember where.

"Q. Was it under seal? A. No, sir.

"Q. Attested by the Corporation Commission? A. No, sir.

"Q. What record was that? A. State Bank Examiner's Report of 6 March, 1926, of the Bank of Midland.

"Q. What was the result of your investigation from the records of the bank and those of the State Department of the Corporation Commission in Raleigh? A. The net result of our audit from the records of this bank and from the information we received from the examiner's report, 5 March, showed a deficit of $1,395.71, and a shortage of $3,523.45."

From an adverse verdict and judgment rendered thereon the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. C. M. Vann and Armfield, Sherrin & Barnhardt for defendant.

STACY, C. J. The chief question presented by the appeal is the competency of the testimony of W. S. Coursey (above set out), with respect to the defendant's alleged shortage, the concealment of which, the State contends, was the motive for burning the building and destroying the records of the bank. Upon this evidence the State's case largely depends. That it is based in part on information obtained from the report of the State bank examiner is conceded, and its incompetency, on the ground of hearsay, is not seriously questioned.

As a general rule, hearsay evidence is not admissible in the trial of causes where substantive rights are involved. *S. v. Springs,* 184 N. C., 768, 114 S. E., 851. Hence, the courts will not ordinarily receive the testimony of a witness as to what some other person told him, as evidence of the existence of the fact asserted. *Roe v. Journegan,* 175 N. C., 261, 95 S. E., 495. "The narration of conversations correctly is the most difficult fact of memory and expression." Piffett's Succession, 37; Lee Ann., 871. Nor will a witness be permitted to testify to facts where his knowledge thereof is derived, in whole or in part, from the unsworn statements of others. *King v. Bynum,* 137 N. C., 491, 49 S. E., 955. "Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." 11 A. & E. (2 ed.), 520.

Speaking to the question in *S. v. Lassiter,* 191 N. C., 210, 131 S. E., 577, *Brogden, J.,* delivering the opinion of the Court, said: "The inherent vice of hearsay testimony consists in the fact that it derives its value not from the credibility of the witness himself, but depends upon the veracity and credibility of some other person from whom the witness got his information." This is the general rule supported by all the authorities on the subject. *S. v. Green,* 193 N. C., 302, 136 S. E., 729.

There are, of course, exceptions to this general rule excluding hearsay evidence, such as admissions, confessions, dying declarations, declarations against interest, ancient documents, declarations concerning matters of public interest, of pedigree, of prescription, of custom, and, in some cases, of boundary, and *pars res gestæ,* but the evidence we are now considering comes under none of them. *Mima Queen v. Hepburn,* 11 U. S., 290.

True the defendant, when he came to testify, was asked about the report of the State bank examiner, and two of the directors of the bank also gave evidence in regard to it, but this did not cure the original error, as the testimony of W. S. Coursey was the keystone in the arch of the State's case.

For the error, as indicated, there must be a new trial, and it is so ordered.

New trial.

FERRIS v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 7 December, 1927.)

Removal of Causes—Courts—Jurisdiction—Diverse Citizenship—Federal Courts—Parties—Fraudulent Joinder—Nonresidence.

In an action against a nonresident railroad company and its resident claim agent, in a personal injury case, to set aside for fraud a release from liability obtained from the plaintiff and to recover an adequate compensation for the injury: *Held,* upon the defendant's petition to remove the cause from the State to the Federal Court for diversity of citizenship under the Federal statute, the question of the diversity of citizenship and fraudulent joinder of the resident defendant, is to be determined by the Federal court when the facts are sufficiently and properly alleged upon the petition for its removal, it thereby appearing that the claim agent was without interest in the result of the controversy except in his limited representative capacity, or only a formal party, and the refusal to order the controversy removed accordingly is reversible error. *Killian v. Hanna,* 193 N. C., 17, cited and distinguished.

CIVIL ACTION before *Bowie, Special Judge,* at July Special Term, 1927, of MECKLENBURG.

This was a civil action instituted by the plaintiff through a next friend against the Atlantic-Tennessee & Ohio Railroad Company, Southern Railway Company and A. L. Harmon, defendants, to recover for personal injuries sustained by the plaintiff by reason of a collision near Mt. Carmel, Ill. Some months subsequent to the said injury, to wit, September, 1923, the defendant, Southern Railway Company, secured a release from the plaintiff, paying him the sum of $7,500. Plaintiff alleged that at the time of signing the release that he was *non compos mentis* and unable to understand the nature and consequence of his acts, and that the defendant "with full knowledge of the mental condition . . . secured the signature of said I. J. Ferris to a certain paper-writing for a consideration which the said I. J. Ferris was in no condition to receive, and which consideration was far less than the expense for care and attention on account of said injuries and so grossly inadequate for the injuries as to shock the conscience," etc.

The defendants in apt time, and in due form, filed a petition for removal of said cause to the Federal Court. The petition for removal alleges that the defendant Atlantic-Tennessee & Ohio Railroad Company had by deed, dated 26 June, 1894, and duly recorded, sold and conveyed to the Southern Railway Company all of its rights and privileges "of every kind and character in the State of North Carolina, including the said line of railway hereinbefore mentioned, running to Statesville, N. C., together with all rights of way, station grounds, yards and equipment," etc. The defendant in the petition for removal further alleged that the defendant, A. L. Harmon, was a mere claim agent for the defendant, Southern Railway Company, and that "the said Harmon, acting solely as the agent of this petitioner, and for and on its behalf alone, did make a bona fide settlement with the plaintiff of any and all claims which the plaintiff had against the Southern Railway Company. . . . That said release was thereupon immediately forwarded by the said A. L. Harmon to this petitioner and has ever since been, and is now, in the possession and under the control of this petitioner, and not in the possession or under the control of said A. L. Harmon. . . . The said Harmon is not a party to said release and is claiming no rights or benefits thereunder, and is not individually interested therein," etc.

The clerk of the Superior Court declined to remove the cause and, upon appeal, the trial judge denied the petition for removal, whereupon the defendants appealed to this Court.

Ralph Kidd and J. A. Lockhart for plaintiff.

John M. Robinson for defendant, Southern Railway Company.

BROGDEN, J. The acknowledged rule in this jurisdiction in regard to removal upon the ground of fraudulent joinder is thus declared by *Stacy, C. J.*, in *Crisp v. Fibre Co.*, 193 N. C., 77: "Upon the filing of such petition, in apt time, when the fraudulent joinder is sufficiently alleged, the suit or action must be removed to the Federal Court, and if the plaintiff desires to traverse the jurisdictional facts, he must do so in that tribunal on motion to remand." *Smith v. Quarries Co.*, 164 N. C., 338.

It is further established law that: "If the facts alleged in the petition, taken to be true, show that the resident defendant has no real connection with the controversy, the petition for removal must be granted by the State court; if they are controverted by the plaintiff, the issues must be determined in the Federal Court, which will remand or retain the action for trial, upon its findings of facts involved in the issues raised." *Connor, J.*, in *Cox v. Lumber Co.*, 193 N. C., 28.

Assuming, therefore, as we are compelled to do, that the facts alleged in the petition for removal are true, it appears that the defendant, Atlantic-Tennessee & Ohio Railroad Company, many years ago sold its entire property to the nonresident defendant, Southern Railway Company, and further, that said Atlantic-Tennessee & Ohio Railroad Company never owned or had any control of the tracks, franchises or appliances in Illinois where the plaintiff was injured. It also appears from the petition that the resident defendant Harmon is a claim agent of the nonresident defendant; that he is not a party to the release referred to in the complaint, and claims no right or interest therein, and has no possession thereof. Hence it is apparent that the resident defendant Harmon "has no real connection with the controversy." Therefore the cause is removable. In the recent case of *Allred v. Trexler Lumber Co.*, *ante*, 547, it is held that whenever it appears that the real controversy is between citizens of different states the presence of mere formal parties will not oust the jurisdiction of the Federal Court. Certainly Harmon, if a party at all, in contemplation of law, is no more than a formal party.

Plaintiff relies upon the case of *Killian v. Hanna*, 193 N. C., 17. It should be observed that there was no petition for removal in the *Killian case*, and it was not considered from that aspect. In addition, the record discloses that it was alleged in the complaint that all of the defendants, "in order to escape their full and just liability in the premises, entered into a conspiracy for the purpose of inducing and procuring a release and settlement for a nominal consideration on account of the death of the said Roy Killian"; and further, that the release complained of "was procured by all of the defendants acting together for their joint and several benefit and protection, and in fraud both for the rights and duties of plaintiff as administrator of said Roy Killian," etc. We are of the opinion that the *Killian case* is clearly distinguishable from the case at bar.

We conclude upon the facts, properly alleged in the petition for removal, that the nonresident defendant was entitled to have the cause removed to the Federal Court.

Reversed.

J. H. HARRISON AND H. L. LOMAX, ADMINISTRATORS OF CHARLES M. LOMAX, v. THE NORTH CAROLINA RAILROAD COMPANY.

(Filed 7 December, 1927.)

1. **Evidence—Nonsuit—Statutes.**

Where the trial court has erroneously overruled defendant's motion as of nonsuit at the close of the plaintiff's evidence, he waives his right thereto by introducing evidence, and upon his renewal of his motion the entire evidence will be considered. C. S., 561.

2. **Same—Defendant's Evidence.**

Upon a motion as of nonsuit under our statute, C. S., 567, the defendant's evidence will not be considered unless favorable to the plaintiff or not in conflict therewith, when it may be used to explain or make clear the evidence introduced by the plaintiff.

3. **Railroads—Negligence—Contributory Negligence — Crossings — Automobiles—Rule of the Prudent Man—Evidence—Nonsuit.**

Where the entire evidence tends to show, in an action by an administrator against a railroad company to recover damages for the negligent killing of his intestate, that the intestate had stopped at the crossing of a highway with two railroad tracks paralleling each other, for the passage of a freight train before driving his automobile across, and then endeavored to cross and was struck by another train passing on the other and nearer track, the evidence however being conflicting as to whether this train was giving the proper signals of warning required at the place, and that the driver of the automobile could have seen the second train in time to have avoided the injury had he looked or listened and observed before attempting to cross, and was killed by this passing train: *Held*, the defendant's motion as of nonsuit should have been sustained on the issue of contributory negligence; nor is the principle affected by plaintiff's evidence in rebuttal, given by a witness who was not present at the time, and who afterwards went there for observation, that the plaintiff could not have seen or been aware of the approach of the train that killed him, testified upon the hypothesis that under the circumstances the smoke from and the noise of the trains would have prevented his being aware of the facts, against the direct testimony of eyewitnesses who made no mention as to this circumstance.

4. **Same—Look and Listen—Degree of Care Required of Plaintiff.**

The driver of an automobile, under the rule of the prudent man, is required to observe due care before driving across a railroad track, as the apparent circumstances at the time may reasonably require for his own safety, and his failure to do so may render his contributory negligence in that respect the cause without which the injury complained of would not have occurred, and entirely bar his recovery of damages in his action.

5. **Evidence—Conflicting Evidence—Hypothetical Conclusions of Fact—Nonsuit.**

Where the evidence on the trial is insufficient in law to take the case to the jury, except that of one witness, which is contradictory, and in part favorable to each of the parties, the issue on which it is given is ordinarily for the jury to decide, but this result will not follow when his testimony in the plaintiff's behalf is based alone upon his fanciful hypothesis as to a possibly existing fact, of which he is not qualified to testify, and the conflict in his evidence arises merely from his argumentative deductions therefrom.

6. **Negligence—Contributory Negligence—Proximate Cause—Nonsuit.**

Where the negligence of plaintiff's intestate in an action by the administrator to recover damages for his wrongful death, has concurred with that of the defendant in producing the injury that caused it, and was the real, efficient and proximate cause thereof, or the cause without which the injury would not have occurred, it bars his recovery.

APPEAL by defendant from *Lyon, Special Judge,* at April Special Term, 1927, of DAVIDSON.

Civil action to recover damages for an alleged wrongful death caused by a collision between one of defendant's passenger trains and an automobile driven by plaintiff's intestate.

The evidence tends to show that about the hour of noon, 20 May, 1925, plaintiff's intestate, Charles Lomax, ran his Ford coupé, in which he and Miss Pauline Castor were riding, upon the defendant's tracks, at a public crossing in the town of Landis, N. C., in front of an approaching train, operated by defendant's lessee, Southern Railway Company, and was killed, while his companion escaped with serious, but not fatal, injuries. There are two parallel tracks at this crossing. Plaintiff's intestate approached from an easterly direction and stopped his car ten or fifteen feet from the railroad to await the passing of a freight train moving southwardly on the more distant track. As soon as the caboose of the freight train cleared the crossing, plaintiff's intestate started to cross the railroad, when he was struck by a fast passenger train running northwardly at the rate of about sixty miles an hour on the track next to him. This track he had about half cleared, as the train hit the rear of his automobile.

Plaintiff introduced two eye-witnesses, who testified in substance as follows:

N. C. McGinnis: I saw the collision. J. F. Rumbley and I were traveling in a Ford coupé, with a closed body, and we stopped our car 25 or 30 feet behind the Lomax car. We were all waiting for the freight train, going southwardly, to pass over the crossing. Mr. Lomax stopped his car within 10 or 15 feet of the crossing. The train which struck the Lomax car was a northbound passenger train, and the accident occurred about noon. I did not hear the train give any signal of its approach. I did not hear any whistle or bell. I will not deny that signals were given by the approaching train, but I did not hear them. There was sufficient noise from the passing freight train to have prevented my hearing the signals if given. I did not see the train until just before it struck the Lomax car. It was "pushing right into the crossing" when I first saw it. As the caboose of the freight train cleared the crossing, Mr. Lomax immediately started to cross. The passenger train was coming up on the track next to him. There is a cut at this crossing. The embankment, in my judgment, is 10 or 15 feet from the rail of the eastern or northbound track. In that space, that is 10 or 15 feet before reaching the track, there is nothing in the world to keep a man from seeing the train approaching from the south if he would look before he got on the track. "If Mr. Lomax had looked from where he was sitting in his automobile, I would say, in my judgment, he could have seen the train, which struck him, approaching for a distance of 75 or 100 yards."

J. F. Rumbley: I saw the collision in which Mr. Lomax was killed. Mr. McGinnis and I were in my automobile behind the Lomax car. It is perfectly level at this crossing, but there is a slight decline after you get over the tracks. The tracks are straight for about 100 yards to the south, then they make a little bend. The embankment is 15 or 20 feet away from the first rail of the eastern or northbound track. At this crossing there is a clear space 20 feet between the rails and the edge of the embankment. In that space of 20 feet, there was nothing to prevent Mr. Lomax from seeing the approaching train from where he was standing. "I would say the train could be seen a distance of seventy-five yards from where Mr. Lomax was standing, down the track, if he had looked."

The evidence of the defendant, as given by eye-witnesses, is to the effect that plaintiff's intestate did not look southwardly in the direction of the approaching train before going upon the track, but that he was either talking with the young lady at his right or looking northwardly up the track in the opposite direction; and that the engineer of the passenger train duly sounded his whistle for the crossing at the whistle post.

In rebuttal, plaintiff offered James Castor, father of Miss Pauline Castor, as a witness, who testified in part as follows: I live about nine miles from Landis, and went down to make an inspection of this crossing about three weeks after the accident. Standing ten feet from the railroad I could not see the train coming because of the embankment, which had weeds and briars growing upon it, maybe three or four feet high. I did not look very closely, but you could not see the train ten or fifteen feet from the rail.

"Q. Standing ten feet away from the track, how far could you see to the south? A. You could not see anything of the train.

"Q. Standing five feet away from the track, how far could you see to the south? A. Down this way towards the south you could not see anything.

"Q. Why? A. Trains have so much smoke.

"Q. Were you there to see? A. No, sir, all trains have smoke.

"Q. How far away from the accident were you when it happened? A. Eleven miles.

"Q. You say that if Lomax had been close up to the railroad track he could have seen the train? A. Yes, sir.

"Q. How far could he have seen it? A. Some two or three hundred yards he could have seen it, but being back ten feet he could not.

"Q. But he could have seen it before he got on the track? A. If he had been right up to the track.

"Q. He could have seen it two or three hundred yards? A. Yes, sir."

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. From the judgment entered thereon, the defendant appeals, relying chiefly upon its exception directed to the refusal of the court to grant its motion for judgment as in case of nonsuit.

J. M. Daniel, Jr., Raper & Raper and Phillips & Bower for plaintiffs.
Linn & Linn for defendant.

STACY, C. J., after stating the case: It appears, from the circumstances detailed above, that, at the close of plaintiff's evidence, a clear case of contributory negligence had been made out and that the defendant's motion for judgment as of nonsuit, first interposed at that time, should have been allowed. This was practically conceded on the argument, but plaintiff stressfully contends that the testimony of James Castor, offered in rebuttal, is sufficient to carry the case to the jury, as only the exception noted at the close of all the evidence may now be considered. *Harper v. Supply Co.,* 184 N. C., 204, 114 S. E., 173.

The exception addressed to the refusal of the court to grant the defendant's motion for judgment as of nonsuit, made at the close of plaintiff's evidence, has been waived under the express provisions of the statute. C. S., 567. The defendant had the right to rely upon the weakness of the plaintiff's case, when he rested, but the defendant having elected to offer evidence, did so *cum onere,* and only the exception noted at the close of all the evidence may now be urged or considered. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356. In considering the last motion, the defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with the plaintiff's evidence, it may be used to explain or make clear that which has been offered by the plaintiff. *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769.

Conceding the soundness of the rule just stated, defendant takes the position that the answers appearing in the testimony of James Castor, which seem favorable to the plaintiff's case, are merely argumentative deductions of the witness, based on a fanciful hypothesis, as there was no evidence of any smoke, and that such deductions are without any probative value as evidence and ought not to be permitted to carry the case to the jury. A critical examination of the testimony of this witness leaves us with the impression that the defendant's view of the matter is correct.

True, this witness seemingly testifies both ways, for and against each party, and such equivocation would ordinarily carry the case to the jury. *Shell v. Roseman,* 155 N. C., 90, 71 S. E., 86. But his statements to the effect that plaintiff's intestate could not "see anything of the train," or "towards the south," because of smoke, must be regarded as chimerical or merely conjectural, as it is established by the testimony of eye-witnesses that there was nothing between the eastern track and the embankment—a distance of from 10 to 15 or 20 feet—to keep him from seeing, had he looked. In its present state, the law is not able to protect one who has eyes and will not see—ears and will not hear. *Furst v. Merritt,* 190 N. C., 397, 130 S. E., 40.

The rights of persons and things ought not to rest, and the law will not permit them to depend, upon the uncertain testimony of a witness who is willing to say that a man cannot see when there is nothing to keep him from seeing. If such statements are without foundation in fact, as they are on this record, they must be held to be without probative value as evidence in law. To hold otherwise would be to surrender to the tyranny of a fetishism on wholly unsubstantial grounds.

It was the duty of plaintiff's intestate to look attentively, up and down the track, in time to save himself, if not prevented from doing so by the fault of the defendant or other circumstances clearing him from blame, and this, under numerous decisions, is required to be done at a time when his precaution may be effective. *Holton v. R. R.,* 188 N. C., 277, 124 S. E., 307; *Cooper v. R. R.,* 140 N. C., 209, 52 S. E., 932.

The evidence of contributory negligence on the part of plaintiff's intestate, coming from plaintiff's own witnesses, with none to exculpate, is certainly as strong, if not stronger, on the present record, than that appearing in the case of *B. & O. R. R. Co. v. Goodman,* 48 S. Ct., 24, decided 31 October, 1927, where *Mr. Justice Holmes,* speaking for a unanimous Court, said: "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train and not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. . . . It is true, as said in *Flannelly v. Delaware & Hudson Co.,* 225 U. S., 597, 603, 32 S. Ct., 783, 56 L. Ed., 1221, 44 L. R. A. (N. S.), 154, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts. See *Southern Pacific Co. v. Berkshire,* 254 U. S., 415, 417, 419, 41 S. Ct., 162, 65 L. Ed., 335."

The standard laid down in this case is but another way of stating the rule of the prudent man, as will be observed from an attentive reading of the language used by the learned Justice who wrote the opinion. He does not say that it is the duty of a driver of a vehicle, on approaching a railroad crossing, to "stop and get out," but such precaution is required only in case he "cannot be sure otherwise whether a train is dangerously near." When a man goes upon a railroad crossing, necessarily a place of danger, he must take such care and precaution for his own safety as a reasonably prudent man would take under the same or similar circumstances.

Tested by this standard, it would seem that the death of plaintiff's intestate was unquestionably due to his own negligence, or that such negligence, concurring and coöperating with the negligence of the defendant, was the real, efficient and proximate cause of the injury, or the cause without which the injury would not have occurred. *Elder v. R. R., ante,* 617.

Nor is this rule essentially different from the one heretofore established by our own decisions. It is universally held that there can be no recovery of damages where the negligence of the traveler contributes proximately to his own injury, though the railroad company may also be guilty of negligence. Thompson on Negligence, sec. 1605.

Speaking to the question in *Coleman v. R. R.,* 153 N. C., 322, 69 S. E., 251, *Brown, J.,* delivering the opinion of the Court, said: "A railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence and will be so declared by the Court." Proceeding, he quotes with approval the following from Beach on Contributory Negligence (sec. 181): "'In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track, and a failure to do so is contributory negligence which will bar recovery. A multitude of decisions of all the courts enforce this reasonable rule.'" Continuing, he says: "There are of course exceptions to this, as well as most other rules, but when the traveler 'can see and won't see' he must bear the consequences of his own folly. His negligence under such conditions bars recovery because it is the proximate cause of his injury. He has the last opportunity to avoid injury and fails to take advantage of it."

The same rule was again declared in *Johnson v. R. R.,* 163 N. C., 431, 79 S. E., 690, where *Walker, J.,* speaking for the Court, used the following language: "On reaching a railroad crossing, and before attempting to go upon the track, a traveler must use his sense of sight and of hearing to the best of his ability under the existing and surrounding circumstances—he must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company, and if he has time to do so; and this should be done before he has taken a position exposing him to peril or has come within the zone of danger, this being required so that his precaution may be effective."

In *Trull v. R. R.,* 151 N. C., 545, 66 S. E., 586, the plaintiff's intestate was standing on a crossing near the main line of defendant's railroad, waiting for a train to clear the track further on his way. While in this position, a shifting engine, engaged in work on the main line, passed down the track, going to a water tank, some distance away. In a short time the engine returned and slowed down at a switch thirty or forty steps from the crossing. The fireman got out, changed the switch, and the engine continued its course on to the crossing, without giving the usual signals. Just at the crossing, and at the precise time of the impact, plaintiff's intestate stepped from a position of apparent safety onto the track, in front of the moving engine, and was killed. The track here was straight; there was nothing to obstruct the view, and, so far as the evidence disclosed, there was nothing to explain or qualify the intestate's obligation to look and listen and be otherwise properly attentive to his own safety. Upon this showing, the Court held, as a matter of law, that plaintiff's intestate was guilty of negligence, concurrent with that of defendant's employees, and sustained a judgment of nonsuit.

The evidence offered by the plaintiff, it seems to us, clearly shows that plaintiff's intestate failed to take proper care and precaution for his own safety, hence it must be declared that, under established rules of law, judgment of nonsuit should have been entered on all the evidence.

Reversed.

HENRY CROMARTIE, ADMINISTRATOR OF HARDY CROMARTIE, v. R. R. STONE, TRADING AND DOING BUSINESS AS STONE TOWING LINE.

(Filed 7 December, 1927.)

1. **Evidence—Nonsuit.**

Upon defendant's motion as of nonsuit, the evidence which makes for the plaintiff's claim and tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its more favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

2. **Negligence—Navigable Waters—Waters—Locks—Dams — Evidence—Nonsuit—Questions for Jury.**

Where there is evidence tending to show that the defendant had anchored for the night its boat towing two lighters, at a government lock or dam on a navigable river, in such a manner as to cause the second lighter, left without a light, to block up the provided entrance to the safe water of the river, and that in the night it caused the raft on which was riding the plaintiff's intestate, in not being able to pass into the safe water, to swing into the fast-flowing water of the middle stream which would carry the raft over the dam, which the defendant from long experience should have known, and that the intestate was in consequence forced to leave the raft, and was carried over the dam and was drowned: *Held*, there was sufficient evidence to take the case to the jury upon the issue of defendant's actionable negligence.

3. **Navigable Waters—Negligence—Rafting Waters—Common Law.**

The rights to the use of navigable water are not superior for boats towing lighters or barges thereon to those using it for rafting purposes, and where the negligence of the former in such use causes the death of an employee on the latter, the principle of law upon the question of due and ordinary care applies as in negligence cases, and upon conflicting evidence the issues are for the jury to determine.

4. Same—Jurisdiction—Federal Courts—Maritime Law.

An action involving the recovery of damages for the negligent killing of plaintiff's intestate while employed in rafting logs on a navigable river, by the tort of the defendant in towing rafts or barges thereon, may be brought by the administrator in the State courts, according to the principles existing at common law, which afford a complete remedy under the issues of negligence, contributory negligence, damages, etc., and the jurisdiction is not confined to the courts of Federal jurisdiction under the maritime law. Section 20 of the Seaman Act of 1915, ch. 153, not considered in deciding this appeal.

APPEAL by defendant from *Barnhill, J.*, and a jury, at April Term, 1927, of BLADEN. No error.

This was an action for actionable negligence brought by plaintiff, the administrator of Hardy Cromartie, deceased, against the defendant to recover damages.

The defendant, in its answer set up the defense that the action is within the exclusive admiralty and maritime jurisdiction of the United States District Court for the Eastern District of North Carolina, and plaintiff's intestate was guilty of contributory negligence.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was plaintiff's intestate's death caused by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. If so, was such death due to the contributory negligence of plaintiff's intestate? Answer: No.

"3. What damage, if any, is plaintiff entitled to recover? Answer: $2,646.00."

The necessary facts and assignments of error will be considered in the opinion.

H. H. Clark, Terry A. Lyon and J. Bayard Clark for plaintiff.
Bryan & Campbell and Ruark & Fletcher for defendant.

CLARKSON, J. The first main question by defendant for decision: Was defendant entitled to have his motion for judgment as in case of nonsuit allowed at the close of plaintiff's evidence and at the close of all the evidence? C. S., 567. We think not. We repeat: "It is the settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom." *Gore v. Wilmington, ante,* at p. 452, and cases cited.

The evidence, undisputed, tended to show: That at King's Bluff, on the Cape Fear River, the United States Government had built a lock or dam and provided a passageway for vessels, rafts, or floating crafts. This lock through which traffic passes is located on the west bank of the river, the right-hand side going down stream. It consists of the two heavy cement walls extending up and down stream several hundred feet. At each end there is a heavy steel gate. From the outer wall of the lock to the east bank of the river extends a dam about eight feet high, over which the river flows. Extending up-stream from the outside wall of the upper gate there is a row of piling, driven in clusters, and bearing slightly out towards midstream, each cluster separate from the other by about fifty feet, extending up-stream a total distance of about one hundred and fifty feet, the last being about ten feet further out from the shore than the first. The purpose of these is to prevent rafts or boats from swinging out into the strong water that goes over the dam while they may be waiting for the lock gate to open. Above the lock about one-half a mile there is a gradual bend in the river, with the point upon the west or right-hand side going down-stream. From this point down to the lock gates close along the west bank the water is quiet as compared to that in the midstream. An old raftsman refers to this strip of water near the west bank as the "dead water," and that further out as the "strong water." In other words, the west bank is still water and further out is the swift waters. The master of defendant's boat had the boat with two barges or lighters, about 27 February, 1926, moored or anchored above the locks at King's Bluff, loading cross-ties, about 700 to 775 feet from the lock. The bow of the lighter in-shore up against the bank and tied to an ash tree. The outside lighter was made fast right up to the other lighter and the boat dropped back and her bow in between the stern of the lighters—the bow being like a wedge between the lighters.

The river bends or curves at this point and from this point the locks could not be seen, when a boat or raft gets to this "point" or "curve," the current will drive it off to the left side of the river in the direction of the current—swift water. The master of the boat with the lighters moored, or anchored, was there about 3 o'clock in the evening before the catastrophe that night to load cross-ties. Night came on and the boat and lighters stayed there. The off-shore lighter was not loaded at this point. The lighters, or barges, were about 22 feet in width and the boat 11 feet wide. The front end of the lighters were tied together and they were 75 feet long. The boat was about 50 feet in length, and the boat's bow about 10 feet between the lighters and about 40 feet of the boat extended down stream below the lighters. The lighters being fastened together at the front end and the bow of the boat between them at the down-stream end, made one of the lighters extend out towards the river current, making the obstruction about 44 feet wide at the point or curve, and in the path of the *still waters.* There was a light on the boat. The off-shore lighter was unloaded and could have been easily dropped down, which would have left some 22 feet and the water comparatively still. So far the parties are in practical agreement.

Plaintiff's evidence tended to show that his intestate, Hardy Cromartie, who had been rafting logs a number of years, with Mingo Atkinson, an experienced raftsman, on the Cape Fear River for thirty years, started down the river with a raft. The raft started from Woodel Ferry, about 12 o'clock noon, Friday; it had eleven clamps of logs 16 feet long; the raft was put together good and tight and 30 feet wide. When they left there was ordinary water in the river and a head of the rise. They reached the locks about 3 o'clock at night. Fire was on the front end of the raft, a bright fire light. A boat was along large enough to carry four men, tied to the side of the raft. Rafts were carried down the river by Atkinson in the night time and day time ever since the locks were built, and the purpose was to do the same that night. Atkinson testified: "I didn't know that the lighter was on the side of the boat until I got to about the middle of the raft, and I was heading right into the lighter with the raft, and pulling the raft out, it threw the front of it in the strong water. Hardy Cromartie was on the back end of the raft and I was on the front end. After passing the lighter he tried to make fast to the first set of piles, and missed that and we got in the boat to go ashore. When we got in the boat we were on the eve of going over the dam—the boat went down and Hardy Cromartie started to swim down the stream the way the raft was going. I held to the boat and hollered for help, and some parties from the locks came out to me with a boat and carried me ashore. I went over the locks holding to the boat. Just as Hardy stepped into the boat it went down, and it was on the eve of going over the dam, and then he swam towards the raft. The raft was going down stream. . . . I could not bring the raft back in towards the hill after passing the lighter. It would have gone over broadside—the curving raft would have caught the tide. . . . I was about the length of the raft when I discovered that there was a lighter tied to the side of the boat, and I was heading right into the lighter, and when I pulled out it put the front end of the raft going towards the dam, and I could not make it curve back. It was too short to come back in behind the lighter and make fast to the wharf. I was in slack water when I discovered the lighter. . . .

"Q. If the lighter had not been alongside of the boat on the outside of the tug-boat, could you have passed down to the lock gate without going far enough into the swift water to have pulled you over the dam? A. Yes, sir. If the lighter had not been beside of the boat I would have kept in the dead water and went right along. I could have picked up there, but the lighter was out so far that it threw us right out in the strong water. . . . I saw lights on the boat, but I *didn't see any on the lighter*. There was no one up moving around on the boat. I hollered when we got there, but I didn't see any one, and no one answered. . . .

"Q. What became of Hardy Cromartie? A. He was drowned. I didn't see him after he tried to catch hold of the raft. His body was later found. . . .

"Q. When rafting down the river, how was it customary to carry the raft, with respect to the river—what side—what part of the river? A. Going to the locks.

"(Court) Q. Yes? A. To the right.

"Q. From the point to the locks? A. On the right. Keep to the right. As soon as we get to that point we hold a raft right to the point and keep along in the dead water until we get near the locks, and when we get near the locks we can take up, and if the lock-keeper is not there we go to his home and get him to turn us through. . . . The dead water extends from the hill out into the river 40 feet to 50 feet. If the water is high you have to begin holding a raft as soon as you get away from Daniels' Landing. It is hard to come in to shore, but if you get in on that point, close in, you can then drift down to the locks. You can set out pretty well on low water, but on high water, as soon as you come around Daniels' Landing you have to pull right in and keep close in. If you don't keep close in, you go over the dam. . . . Well, when I discovered the lighter was side of the boat, I couldn't see the boat—I mean the lighter—until I got about the length of the raft, and after I discovered it I was near the lighter and pulled the front out, and that threw the front end into the *live water*. . . . When the raft gets into the swift water going down stream below Daniels' Landing it goes over the dam. You can't save one and put it through the locks if it gets into the swift water from Daniels' Landing on down. It will go over the dam. When the raft passed the lighter it was partly in swift water and partly in slack water, and when it passed the lighter it was heading straight for the dam. When we passed the lighter I had no idea but that it was going over then. I believed it was going over then, but we tried to make fast to the first piling, and missed that, and I took the boat and paddled back, and as soon as Hardy stepped in it sunk down."

The combined width of the lighters and the boat was greater than the strip of dead water along the west bank, which was practically the only navigable part of the river at this point. *About nine o'clock on the night in question,* a raft came down to the lock, in charge of Grant McKoy and a helper. It came upon the boat and lighters anchored in the dead water. It could not get around this obstruction and back into the lock gate without going into the strong water. Such was attempted by the raft, but it went over the dam.

Several raftsmen of long years' experience, testified, in substance: If a raft comes around the up-stream so far out in the stream as to be unable to pull into the strip of dead water lying immediately along the western shore, it can never reach the lock gate, and always goes over the dam. This strip of dead water is the only navigable part of the stream at this point. All traffic must pass through the lock. In order to do so this strip of dead water, and it only, must be used. This is true in a peculiar way of a timber raft, which can move along only as the current moves it.

Defendant's evidence tended to show: The boat had a light on it, also there were *lights on the barges, or lighters.* The master of the boat testified: There was about a twelve foot rise in the river. *This raft was coming right down the middle of the river.* "I stayed up until the raft went over the dam. The men were hollering when they passed me. They never came within forty feet of the lighter or the boat. They were off in the river. My boat and lighters were lying in a pocket above the locks—I am speaking about the raft which Henry Cromartie was on, and I say it was ten minutes to four when I first was aroused from sleep and heard them hollering. They went over the dam ten or fifteen minutes later. It was the hollering that roused me from sleep and caused me to come out and look up the river, and the raft was out in the current on the east side of the river when I first saw it, and it was about a quarter of a mile up the river from my boat when I saw it, and passed not nearer than forty feet from my off-shore lighter. This raft did not get near enough to me to render any aid."

The principle is well stated in 27 R. C. L., sec. 227, p. 1320, as follows: "The right to use watercourses as highways, and the right to use highways on land, are said to be analogous, and to depend on the same general principles. One's right to navigate a public river is not a private but a public right, to which he is entitled only in common with the whole public. Any and all of the public have an equal right to a reasonable use, but the enjoyment by one necessarily interferes to some extent, for the time being, with its absolutely free and unimpeded use by others, and each must exercise his rights with a proper regard for the rights of others. Navigable waters constitute a public highway, open and free for the passage of all classes and sizes of water craft which have a right to follow the usual channels. And a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or by water, as a traveler for business. This common right exists not only between boats, but also between boats and logs floating down a stream." See *Hardison v. Handle Co., ante,* 351.

The river is a public highway, all having equal rights to navigation. Where defendant anchored the boat and lighters, or barges, from the plaintiff's testimony, which was accepted by the jury, it was in the wake of the only safe passage for rafts. Defendant knew, or ought to have known in the exercise of due or ordinary care, that rafts were customarily traveling the river highway at night as well as day going through the lock. The master of defendant's boat had been plying or traveling the Cape Fear River for thirty odd years. That the mooring or anchorage of the boat and lighters without a light on the offshore lighter, or barge, the raft would in turning the point or curve to get into still water, either collide with the lighter or be thrown out into the swift current and go over the dam. The defendant had a right to anchor on the river highway, but the peculiar place, near the point or curve in the river, where the raft had to turn into still water to keep from the swift current. The manner—the two lighters tied together at the top, and the bow of the boat between them at the end, throwing the rear of the off-lighter further into the river, perhaps fifty feet, taking up practically all the still water, the raft traffic passageway, no light on the off-lighter. It was a question of due and ordinary care and a fact for the jury, and the motion for nonsuit properly overruled. The court below gave the contentions of the parties clearly and fairly, explained the law applicable to the facts and charged the well-settled law as to negligence, proximate cause and contributory negligence.

The second main question presented by defendant for decision: Was it the duty of the court to apply the law as it exists in Admiralty, or as to common law in the courts of the State, when the tort complained of, if any, was committed upon the navigable waters of Cape Fear River?

We think the action was tried correctly, under the principles of the common law and the issues of negligence, contributory negligence and damages the proper ones. We adduce from the decision of the United States Supreme Court, construing the statutes, civil causes of maritime and admiralty jurisdiction actions in tort, *in personam* and not *in rem,* under the facts as shown in this case, as follows: "State courts can exercise jurisdiction and give a remedy for a consequential injury growing out of a marine tort, where no remedy for such an injury exists in the admiralty courts. A suitor may have a remedy in a case in a State court, even if the admiralty courts have jurisdiction, where the right of action was created by a State statute enacted subsequent to the passage of the judiciary act. Suitors may have a common-law remedy in all cases where the common law is competent to give it. These principles applied to a suit in a State court by an administrator, to recover damages, under a State statute, for an act causing the death of his intestate, done by a steamer in navigable waters." Syllabus in *American Steamboat Co. v. Chace,* 83 U. S. Sup. Ct. Reports, p. 522, 21 Law Ed., p. 369. See notes, p. 1030. The *Chace case* is approved in *Panama Railroad Co. v. Vasquez, Admr.,* 271 U. S., p. 557. In the latter case it is said, at p. 559: "The sole question presented is whether State courts may entertain such actions, the defendant's contention being that they are cognizable only in the Federal District Court. . . . (p. 560.) The sections of the Judicial Code just cited, while investing the Federal District Courts with jurisdiction 'exclusive of the courts of the several states' of all 'civil causes of admiralty and maritime jurisdiction,' contain an excepting clause expressly 'saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it.' The clause is a continuation of a like clause in the Judiciary Act of 1789 and always has been construed as permitting substantial rights under the maritime law to recover money for service rendered, or as damages for tortious injuries, to be asserted and enforced in actions *in personam* according to the course of the common law. *Chelentis v. Luckenbach Steamship Co.,* 247 U. S., 384; *Panama R. R. Co. v. Johnson, supra* (264 U. S., 375), p. 388, 390. And it uniformly has been regarded as permitting such actions to be brought in either the Federal courts or the State courts as the possessor of the right may elect. (Citing numerous authorities) . . . (p. 561). In so saying, we must be understood as fully recognizing what often has been held in other cases—that the saving clause does not include suits *in rem* or other forms of proceeding unknown to the common law. (Citing numerous authorities) . . . (p. 562). And that the more reasonable view is that it is intended to regulate venue and not to deal with jurisdiction as between Federal and State courts." See case on "all fours" as to present action, citing *Vasquez case, supra; Messel v. Foundation Co.,* 47 Supreme Court Rep., p. 695 (decided 31 May, 1927).

Our own Court, in *Smith v. R. R.,* 145 N. C., at p. 101, lays down the same principle as follows: "The action being prosecuted in the State courts for alleged negligence, the rules obtaining in courts of admiralty in such cases do not apply. The rights and liabilities of the parties are to be ascertained by resorting to the principles which control in actions for alleged negligence wherein contributory negligence is set up as a defense."

In passing on this matter it may not be amiss to say that we are not now considering section 20 of the Seaman Act of 1915, ch. 153, 38 Stat., 1164, as amended by section 33 of the Merchant Marine Act of

1920, ch. 250, 41 Stat., 988, under which the Vasquez action, *supra,* arose. Where a *seaman* suffered personal injuries *in the course of his employment,* and the Seaman Act, *supra,* gave the same rights as railway employees under the Federal Employers Liability Act. The Seaman Act was applied to common-law action brought in State courts, and "stevedores" were included in the act. See *International Stevedoring Co. v. Harverty,* U. S. Sup. Ct. (1926), 71 Law Ed., 22. In actions of that kind, although tried in the State court, the fellow-servant doctrine is abolished and contributory negligence shall not bar recovery, but shall only diminish the damages, except that no employee injured or killed where the violation of a safety law for employees contributed to the injury, shall be held to have been guilty of contributory negligence. See *Inge v. R. R.,* 192 N. C., at p. 536 (petition for writ of *certiorari* denied by Sup. Ct. of U. S., 28 February, 1927); *Troxler v. R. R., ante,* 446.

In *Robins Dry Dock and Repair Co. v. Lars Dahl,* 266 U. S., p. 449, 69 Law Ed., p. 372, it is held (syllabus): "The right and liabilities of the parties to an action by one doing repair work on a vessel lying in navigable waters of the United States, to recover damages for injuries caused by the breaking of a scaffold, arise out of and depend upon the general maritime law, and cannot be enlarged or impaired by the statute of the State where the injury occurred. It is error in an action in a State court to recover damages for injuries to an employee engaged in repairing a vessel lying in navigable waters of the United States, due to the breaking of a scaffold, to permit the jury, in determining the question of negligence, to consider a *State statute fixing the duty of the master with respect to scaffolds."* (Italics ours.) The assignments of error are untenable.

The action was tried with care, and after examining with pains the record and the able briefs of counsel, we can find, in law,

No error.

MELZIE WATTS ET AL. v. LEWIS LEFLER AND A. F. LEFLER.

(Filed 7 December, 1927.)

Trials—Nonsuit—Verdict—Damages—Appeal and Error—New Trials.

In a personal injury negligent action brought by several plaintiffs, where a judgment of nonsuit as to the recovery of one of them is rendered, during the trial, who appeals, the verdict of the jury awarding damages to all is not available to the nonsuited plaintiff, as after the nonsuit he was not a party to the further proceedings, and must abide by a smaller amount of damages awarded by the verdict upon the subsequent trial.

CIVIL ACTION, before *Schenck, J.,* at February Term, 1927, of CABARRUS.

Melzie Watts, Wiley V. Davis, Mosie Ree Reel and Charles E. Turner each instituted separate actions for damages against the defendants, Lewis Lefler and A. F. Lefler. A. F. Lefler was the father of Lewis Lefler and owned the automobile which the plaintiffs allege collided with the truck in which they were riding, and as a result of which they sustained personal injuries. Lewis Lefler was driving the automobile at the time of said collision. The cases were consolidated for trial. Both sides appealed.

H. S. Williams, J. Lee Crowell, Jr., and J. L. Crowell for plaintiffs.

Hartsell & Hartsell and Armfield, Sherrin & Barnhardt for defendants.

PLAINTIFFS' APPEAL.

PER CURIAM. This cause was considered upon a former appeal reported in 190 N. C., p. 722. In that case judgment of nonsuit was entered as to the defendant, A. F. Lefler, and the cause was prosecuted to final judgment against the defendant, Lewis Lefler, who did not appeal. This Court reversed the judgment of nonsuit so entered. In the former trial upon issues submitted as to the liability of Lewis Lefler the jury awarded damages to plaintiffs as follows: Melzie Watts, $2,500; Wiley V. Davis, $250; Mosie Ree Reel, $250, and Charles E. Turner, $500. Thereafter at the February Term, 1927, the cause was again tried upon the following issues:

1. Was Lewis Lefler the agent and servant of the defendant, A. F. Lefler, at the time of the injury to the plaintiff, Melzie Watts, as alleged in the complaint?

2. Was the injury to the plaintiff, Melzie Watts, caused by the negligence of the defendant's agent and servant, Lewis Lefler, as alleged in the complaint?

3. Did the plaintiff, Melzie Watts, by her own negligence contribute to her own injury, as alleged in the answer?

4. What damage, if any, is the plaintiff, Melzie Watts, entitled to recover of the defendant, A. F. Lefler?

The jury answered the first two issues "Yes" and the third issue "No" in each of the four cases or as to each of the four plaintiffs; and answered the fourth issue $1,200 as to Melzie Watts; $75 as to Wiley V. Davis; $25 as to Mosie Ree Reel, and $200 as to Charles E. Turner.

The plaintiffs contend that, as the nonsuit in the former trial was reversed, the defendant, A. F. Lefler, is bound by the verdict in the former suit, and should therefore be required to pay the larger amounts specified in the judgment against Lewis Lefler rather than the smaller amounts awarded by the jury in the present case. This contention cannot be sustained. Ordinarily joint *tort feasors* may be sued separately or together. *Hipp v. Farrell*, 169 N. C., 551; *Raulf v. Light Co.*, 176 N. C., 691; *Martin v. Buffaloe*, 128 N. C., 305. When the trial court sustained the motion of nonsuit as to the defendant, A. F. Lefler, in the first trial he had no connection with the subsequent proceedings of the court, and hence was not a party to the judgment rendered. Therefore, he would not be estopped by said judgment. Moreover the issues in the case at bar are not identical with the issues in the former case, and one of the essentials of the estoppel by judgment is the identity of issues. *Hardison v. Everett*, 192 N. C., 371. We conclude upon the plaintiffs' appeal that the judgment should be affirmed. No error.

DEFENDANTS' APPEAL.

A careful examination of the assignments of error in the defendants' appeal discloses no error of law. The judgment is affirmed.

No error.

FLODA P. LENTZ v. JOHN W. LENTZ.

(Filed 7 December, 1927.)

Judgments—Consent—Contracts—Courts—Contempt.

A judgment entered by the court upon the written consent of the parties, without express provision therein, only confers upon the courts the power to construe the contract as it is written, and excludes from it the power to adjudge a party thereto in contempt for the violation of its terms.

APPEAL by plaintiff from *Townsend, Special Judge,* at Special June Term, 1927, of CABARRUS. Affirmed.

Armfield, Sherrin & Barnhardt for plaintiff.

Hartsell & Hartsell, W. H. Woodson and Hayden Clement for defendant.

PER CURIAM. This Court rendered the opinion that the original judgment in this action was a consent judgment. *Lentz v. Lentz*, 193 N. C., p. 742.

The question presented: Is it error for the court below to hold that the defendant is not guilty of contempt in failing to pay the monthly installments due on a consent judgment? We think not.

In *Coburn v. Comrs.,* 191 N. C., at p. 74, it is said: "This consent judgment left a discretionary power in the court to make such orders or decrees *for the protection of the rights of all parties."*

There is no provision in the judgment in the present action that leaves the matter open, or any provision giving the court discretionary power as the *Coburn case, supra.* This Court can only construe the contract—consent judgment—as written.

The parties might have left the matter discretionary with the court, as in the *Coburn case, supra,* but this they did not do.

Affirmed.

L. H. FOCHTMAN v. WALTER GREER.

(Filed 7 December, 1927.)

1. **Limitation of Actions—Pleadings—Courts—Justices of the Peace—Appeal—Trial de Novo—Discretion.**

An appeal from a court of a justice of the peace is tried *de novo* in the Superior Court, C. S., 661, and when the account sued on is admitted in the former court, it is discretionary with the trial judge to permit the plea of the statute of limitations which is necessary to defendant's right to set it up.

2. **Actions—Interveners—Burden of Proof.**

The burden of proof is upon the intervener in an action.

APPEAL by defendant from *Sinclair, J.,* and a jury, at May Special Term, 1927, of ASHE. No error.

W. B. Austin for plaintiff.
W. R. Bauguess for defendant.

PER CURIAM. Plaintiff brought an action against defendant on a promissory note, before a justice of the peace. A warrant of attachment was sued out at the time and service was had by publication. We are bound by the record. It discloses that when the cause came on for trial before the justice of the peace defendant, through his attorney, entered a special appearance, *admitted the correctness of the account,* and moved to vacate the attachment on the ground that defendant was a resident of this State. This motion was overruled and judgment was rendered in favor of the plaintiff, from which the defendant appealed to the Superior Court. Subsequent thereto Emma Greer and Fay Graham intervened, alleging ownership to certain personal property attached in the action. This issue was tried in the Superior Court. The jury decided against the interveners. The attorney who appeared in the justice of the peace's court for defendant represented the interveners in the Superior Court.

The burden of the issue to be answered by the jury was upon the interveners. *Sugg v. Engine Co.,* 193 N. C., p. 814.

From the record we find that in the justice of the peace's court defendant "admitted the correctness of the account." In the Superior Court defendant offered to plead the statute of limitation, through the same attorney who represented the interveners and who had entered a special appearance for defendant in the justice of the peace's court and moved to vacate the attachment on the ground that defendant was a resident, but admitted the correctness of the account. The court refused to allow this to be done. On an appeal to the Superior Court the trial is *de novo,* "a new trial of the whole matter." C. S., 661. The defense of the statute of limitation, to be available, must be pleaded. 8 Encyc. Dig., N. C. Reports, p. 887, sec. 134, and cases cited.

Defendant did not plead the statute of limitation, but admitted in the justice of the peace's court the correctness of the debt. The leave to file answer in the Superior Court and plead the statute of limitations, under the facts and circumstances of this case, was in the discretion of the court below. Defendant cannot "blow hot and cold in the same breath."

The cases of *Woodard v. Milling Co.,* 142 N. C., p. 100, and *White v. Peanut Co.,* 165 N. C., p. 132, are not in conflict with the position here taken. We find

No error.

W. VANCE BROWN ET AL. v. T. AARON BUCHANAN.

(Filed 14 December, 1927.)

1. **Reference—Objections and Exceptions—Issues—Trial by Jury.**

A party duly and aptly excepting to an order of reference, and also to the admissions of evidence before the referee, and submitting issues, secures his right thereby to a trial by jury upon the issues presented by him.

2. **Evidence—Boundaries—Common Reputation—Hearsay.**

Where it is agreed by the parties that the establishing of a beginning point should control the right of the plaintiff to mine upon the lands in dispute, the testimony of a surveyor to establish the true location of this point, based upon declarations of common reputation, is admissible as hearsay, unless in accordance with the requisites that they existed before the trial, had their origin at a time comparatively remote, were made *ante litem motam*, attached to some monument of boundary or natural object, or fortified by evidence of occupation and acquiescence tending to give the land some definite and fixed location.

3. Jury—Evidence—Appeal and Error—Reversal.

Where the rights of the parties to the action are made to depend upon the true location of a boundary line of lands, it is reversible error for the trial judge, without consent of the appellant, to permit the jury to take into the jury room with them, to aid in their deliberations of the issue, certain relevant maps, etc., that had been introduced in evidence. *Nicholson v. Lumber Co.*, 156 N. C., 59, cited and approved; *Gooding v. Pope, ante*, 404, as to comparison of handwriting cited and distinguished. C. S., 1784, not applying.

APPEAL by plaintiffs from *Moore, J.*, at July Term, 1927, of MITCHELL. New trial.

Action involving title to mineral interests in a tract of land, situate in Mitchell County, and described in the complaint.

Only one issue was submitted to the jury. It was answered as follows:

"Are the plaintiffs in the above-entitled action the owners and entitled to the possession of the mineral interests in and to the boundary of land described in the complaint? Answer: No."

From judgment on the verdict plaintiffs appealed to the Supreme Court.

John W. Ragland, Lambert & Lambert and Merrimon, Adams & Adams for plaintiffs.

McBee & Berry and Pless, Winborne, Pless & Proctor for defendant.

CONNOR, J. At July Term, 1924, this action, then pending in the Superior Court of Mitchell County, was referred by the judge presiding for trial. C. S., 573, subsection 3. The order of reference was made, notwithstanding the objection of defendant, who duly excepted thereto. Defendant was, therefore, not deprived of his constitutional right to a trial by jury of the issues of fact arising upon the pleadings. *Lumber Co. v. Pemberton*, 188 N. C., 532. When the report of the referee, to which exceptions had been duly filed by the defendant, came on for hearing, defendant tendered issues to be submitted to the jury upon such trial.

At the trial plaintiffs offered in evidence State Grant No. 2148, to William Cathcart, dated 20 July, 1796, and duly recorded in Mitchell County. Plaintiffs claimed under this grant. A map, made under an order of the court, and showing the contentions of the parties, was also introduced as evidence.

The following agreement was thereupon entered into by and between counsel representing plaintiffs and defendant, and made a part of the record as a stipulation for the trial of this action:

"It is agreed that if plaintiffs shall establish, by the greater weight of the evidence, the beginning corner of the grant to William Cathcart, No. 2148, at the point marked 'walnut' near the mouth of Gouges Creek, then it is admitted that the black line, A, B, C, D, and F, is the correct location of the line claimed by plaintiffs under Grant No. 2148, and also that the land described in the complaint is included in the boundary of said grant, and that, in such event, the plaintiffs are the owners of such interest as passed by said grant; and it is further admitted that Grant No. 2148 is known as the 'Brown Speculation 99,000-acre grant'; and it is admitted that if the plaintiffs fail to establish their beginning corner as just stated, or if the beginning corner shall be established at the place marked 'walnut' on the court map, the junction of the red line with the river, then the grant under which the plaintiffs claim does not cover the land in controversy."

The answer to the issue submitted to the jury was thus made to depend upon the location of the beginning point in the description of the land contained in the Cathcart Grant.

Plaintiffs offered evidence tending to show that said beginning corner is at the mouth of Gouges Creek, at the point marked "walnut" on the map; defendant offered evidence tending to contradict plaintiffs' evidence and to show that said beginning corner is at the point marked "walnut, 3 old corners," on the map.

R. L. Wiseman, one of the court surveyors, on his cross-examination by plaintiffs, as a witness for defendant, testified that "old man Sheriff Wiseman" told him, while on the survey, that the corner of the grant was at the mouth of Gouges Creek, and that some said it was at one place and some said that it was at another. On his redirect examination this witness was asked the following questions:

"Q. Who told you that the line was over on the other ridge? A. Mr. Filmore Rose and a number of fellows there in the mines.

"Q. Who else, do you recollect? A. Mr. John English, the son of Isaac English, and a brother of Mrs. Wiseman, who was on the stand this morning.

"Q. If the speculation line ran as they contend, or as the plaintiffs now contend, were they mining inside the speculation line? A. They were right on the line. They had mined above it and below it, and all through there. They stopped me and I went out.

"Q. Who did you hear say anything about the oaks on the Bald? A. I have heard it rumored that was the corner of the speculation line.

"Q. Is there any general reputation in that community as to the location of the speculation line on the Balds? Under such reputation, where is the location of the speculation line with relation to the Big Bald, on the Little Bald? A. On the west side of the Big Bald, between the Balds, but more on the west side of the Big Bald."

The witness further testified that he knew of no one, now dead, who had ever made statements to him in regard to the location of the beginning corner, called for in the grant.

Plaintiffs' assignments of error based upon exceptions, noted in apt time, to the foregoing questions and answers, must be sustained.

Declarations with respect to the location of lines and corners, or with respect to general reputation as to such location when offered in evidence, are "hearsay," and as such are inadmissible upon an issue involving such location, unless brought clearly within the exceptions to the rule excluding "hearsay" as evidence.

In *Pace v. McAden,* 191 N. C., 137, *Adams, J.,* says: "The requirements for the admission of unsworn declarations are that the declaration be made *ante litem motam,* that the declarant be disinterested, when it is made, and that he be dead, when it is offered in evidence." *Tripp v. Little,* 186 N. C., 215; *Sullivan v. Blount,* 165 N. C., 7; *Hemphill v. Hemphill,* 138 N. C., 504. The grounds upon which this exception to the rule excluding hearsay as evidence is based, are stated and discussed by *Merrimon, J.,* in *Bethea v. Byrd,* 95 N. C., 309, which has been frequently cited and approved by this Court.

In *Hoge v. Lee,* 184 N. C., 44, *Adams, J.,* says: "In this State both hearsay evidence and common reputation, subject to certain restrictions, are admissible on questions of private boundary, but common reputation should have its origin at a time comparatively remote, always *ante litem motam,* and should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location." This principle is also stated by *Allen, J.,* in *Sullivan v. Blount,* 165 N. C., 7, in the following words: "It is equally well-settled that evidence of common or general reputation is competent in the location of private boundary, if (1) the reputation had its origin at a time comparatively remote, and (2) existed before the controversy, and (3) attached itself to some monument of boundary, or natural object, or is supported by evidence of occupation and acquiescence tending to give the land some fixed or definite location."

It was error to admit as evidence the testimony of the witness Wiseman with respect to the unsworn declarations of persons as to the location of the corner in controversy, or as to general reputation of lines and boundaries, tending to locate said corner, in the absence of evidence establishing the facts upon which such testimony was admissible under the exceptions to the rule excluding such testimony. In view of the stipulation between counsel, this error was especially prejudicial, and entitles plaintiffs to a new trial.

With respect to the remaining assignment of error appearing in the record, based upon plaintiff's exception to the action of the court, in permitting the jury to take the certified copy of the warrant of survey, with the map attached, into the jury room, and to retain same while engaged in their deliberations, it is sufficient to cite *Nicholson v. Lumber Co.,* 156 N. C., 59. In the opinion in that case, *Hoke, J.,* says: "While we uphold the action of the court on the question suggested, the plaintiff is entitled to a new trial by reason of another exception duly entered, for that the court, over plaintiff's objection, allowed the jury to take this plat and certificate to their room and inspect the same in their deliberations. This is contrary to our practice and has been condemned in several decisions of this Court." See cases cited.

Our decision upon the appeal in *Gooding v. Pope, ante,* 404, 140 S. E., 21, is not an authority upon the question here presented. In that case the papers sent by the court to the jury room, over defendant's objection, and upon the request of the jury, were admissible in evidence under the statute, C. S., 1784. This statute was enacted to change the rule at common law, theretofore followed in this State, with respect to the admission of writings for the purpose of comparing handwritings. The distinction between that case and the instant case is, we think, apparent. Upon the authority of *Nicholson v. Lumber Co., supra,* plaintiffs' assignment of error with respect to the sending of the certificate and map to the jury room is sustained. Plaintiffs are entitled to a

New trial.

BERTIE HUNSINGER, ADMINISTRATRIX OF JAMES R. HUNSINGER, v. CAROLINA, CLINCHFIELD AND OHIO RAILWAY.

(Filed 14 December, 1927.)

Negligence—Contributory Negligence—Last Clear Chance — Railroads — Wrongful Death—Fact of Killing—Instructions.

In an action against a railroad company for the negligent killing in the night of the plaintiff's intestate by the defendant's train running over him while lying apparently helpless upon the track, involving the issues of negligence, contributory negligence and the last clear chance, in which both in the pleadings and by the evidence it is controverted as to whether the intestate was dead at the time the train struck him, the fact as to whether he was killed by the train should first be determined by the jury, and a charge that fails to instruct the jury as to the law arising from the evidence in the case is reversible error to the defendant's prejudice.

APPEAL by defendant from *McElroy, J.,* at April Term, 1927, of CLEVELAND. New trial.

Action to recover damages for death of plaintiff's intestate alleged to have been caused by the negligence of defendant.

The issues were answered by the jury as follows:

1. Was plaintiff's intestate killed by the negligence of the defendant as alleged in the complaint? Answer: Yes.

2. Did plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer? Answer: Yes.

3. Notwithstanding the negligence of plaintiff's said intestate, could the defendant, by the exercise of ordinary and reasonable care, have avoided killing the said James R. Hunsinger? Answer: Yes.

4. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $15,000.

From judgment upon the verdict defendant appealed to the Supreme Court.

W. C. McRorie and Ryburn & Hoey for plaintiff.

J. J. McLaughlin, Pless, Winborne, Pless & Proctor and Fred D. Hannah for defendant.

CONNOR, J. In her complaint in this action, plaintiff alleges "that on the morning of 7 June, 1925, at about 2:45 a.m., plaintiff's intestate, James R. Hunsinger, was down upon the track of defendant railroad company at a point near the depot of defendant at Forest City, N. C., and was stricken on said track by the northbound fast freight train of defendant and killed."

Answering said allegation, defendant says: "It is admitted that plaintiff's intestate was down on the track of the defendant company at a point near the depot of defendant at Forest City, and was stricken by a northbound train at some hour near the time alleged in said paragraph. It is denied that defendant killed plaintiff's intestate, but on the contrary, as defendant is informed and believes, and therefore alleges, the said intestate was dead on the track before the approach of said train."

The primary question involved in the first issue was whether or not the injuries inflicted by defendant's train upon the body of plaintiff's intestate caused his death. If defendant's train did not kill said intestate, plaintiff cannot recover in this action, notwithstanding defendant's negligence in the operation of its train, as alleged in the complaint. Defendant denies not only negligence in the operation of its train, but also that said train killed the deceased.

Upon the trial there was evidence tending to show that the death of plaintiff's intestate was caused by defendant's train; that although down on the track at the time he was struck, he was not dead, but alive. On the contrary, there was evidence tending to show that prior to the time he was stricken by defendant's train he had received fatal injuries on his head, from which he had died before his body was placed on the track. In view of the sharp conflict in the evidence with respect to this phase of the case, it was for the jury to determine first, before considering the evidence pertinent to the allegations of actionable negligence involved in the first issue, whether or not plaintiff's intestate was killed by defendant as contended by plaintiff. The law of this State forbids the judge from giving, in his charge to the jury, an opinion as to whether or not a fact is fully or sufficiently proven, that being the true office and province of the jury. C. S., 564.

With respect to the first issue, the court charged the jury as follows:

"The court further charges you, gentlemen of the jury, that if you find from the evidence and by its greater weight, that defendant's servants in charge of the engine either discovered, or by the exercise of ordinary care might have discovered plaintiff's intestate lying on the track in an apparently helpless condition, and that defendant's servants in charge of the engine could, by the exercise of ordinary care, have stopped the train and avoided the accident after seeing the plaintiff's intestate in a place of peril, or if they could have seen him by the exercise of ordinary care and that plaintiff's intestate was killed by reason of and as a proximate result of the failure of defendant's servants and agents to stop such train after they saw or could have seen plaintiff's intestate lying on the tracks, then, gentlemen of the jury, the court charges you it would be your duty to answer the first issue 'Yes,' but if plaintiff has failed to satisfy you by the greater weight of the evidence of these facts, then it is your duty to answer the issue 'No.' If you answer the first issue 'No,' that is, that plaintiff's intestate was not killed by the negligence of the defendant company, you need not answer the other issues at all, as that ends the case, but if you answer the first issue, 'Yes,' you will proceed to the consideration of the second issue."

With respect to the second issue, the court charged the jury as follows:

"The court charges you that under the pleadings and evidence in this case it is your duty to answer this second issue 'Yes,' as the plaintiff sets forth the fact that her husband was at the time intoxicated or under the influence of some drug, and in such condition that he went upon the track and became in a helpless condition while on the track."

Defendant's assignments of error, based upon exceptions to these instructions, must be sustained. While defendant denied the allegations of actionable negligence in the complaint, and offered evidence tending to contradict the evidence offered by plaintiff, in support of these allegations, its defense was based primarily upon its denial that plaintiff's intestate was killed by its train. These instructions are predicated upon the fact that the death of the deceased was caused by the train, and if this fact had been admitted or found by the jury, are correct. But this primary fact was sharply controverted, and there was evidence from which the jury might have found the facts to be, not as contended by plaintiff, but as contended by defendant. We do not find anywhere in the charge of the court to the jury, which is set out in full in the case on appeal, that the controversy as to this matter was clearly submitted to the jury.

The evidence in support of plaintiff's contention that deceased was intoxicated, or under the influence of a drug, immediately prior to his being stricken by the train, and was down upon the track in this condition, was to say the most, very slight. There is, indeed, no evidence that he was under the influence of a drug; there is evidence that he had taken a drink of whiskey, during the evening before he was found upon the track, between two and three o'clock in the morning, dead, with wounds upon his head, and with his body cold. There is no evidence from which the jury could find that he drank whiskey or other intoxicant, after he had returned home from the swimming pool. In the meantime he had driven a Ford car, with plaintiff, his wife, as a passenger, some eight or ten miles to her father's home, and after his return to his home, had shaved himself, shortly before his dead body was found on the track. There was other evidence tending to show that he was sober, and not drunk, within a half hour before he was found dead. There was evidence, which should have been submitted to the jury for its consideration, under proper instructions, tending to show that plaintiff's intestate was dead at the time his body, lying upon defendant's track, was struck by its train. The evidence tending to show defendant's liability for the death of deceased, because of its negligence as the proximate cause of his death, did not become pertinent, until the jury had first found that defendant killed the deceased.

We do not deem it necessary to discuss other assignments of error appearing in the case on appeal. For the errors assigned and sustained upon this appeal the defendant is entitled to a

New trial.

B. H. ALDRIDGE AND BELLE W. ALDRIDGE, HIS WIFE, v. GREENSBORO FIRE INSURANCE COMPANY.

(Filed 14 December, 1927.)

1. **Pleadings—Enlarging Time—Courts—Discretion—Statutes.**

The judge of the Superior Court where a civil action has been brought has the discretionary power to enlarge the time in which an answer may be filed to the complaint beyond that limited before the clerk, upon such terms as may be just, by an order to that effect. C. S., 536; Public Laws 1921, Ex. Ses., ch. 92; Public Laws 1923, ch. 53; Public Laws 1924, Ex. Ses., ch. 18.

2. **Insurance, Fire—Policies—Contracts—Sole Ownership—Encumbrance—Principal and Agent—Waiver.**

Where a policy of fire insurance provides that, not subject to waiver, it will be void if the insured has not the sole or absolute title to the property, unless specifically appearing by agreement to the contrary in the policy contract, it may be waived by the local agent when fully informed that the title was held in entirety by the insured and her husband, and encumbered by a mortgage in a specified amount, and the policy is accordingly issued and the premiums paid.

3. **Same—Imputed Knowledge—Forfeiture—Equity.**

Equity will construe a contract to reasonably avoid a forfeiture, and where the agent of a fire insurance company delivers a policy of fire insurance to the insured, with knowledge, contrary to its terms as affecting its validity, that the insured did not have sole and unconditional ownership, etc., the knowledge of the agent is imputed to the insurer and is a waiver of the written terms of the policy contract, upon its unconditional delivery.

4. **Same—Notice.**

Where the agent of a fire insurance company has been informed by the insured that the property was subject to a debt, and that the policy, as he may elect, might be made to herself or to her husband, or both, as it belonged to them: *Held*, sufficient to put the agent on his guard, and inequitable to void the policy because the property was owned by the wife and her husband in entirety, and that the debt was not sufficiently described, and a forfeiture of the policy for that reason will not be decreed; and further, it is immaterial whether the agent understood the nature of real property so held by entirety.

APPEAL by defendant from *Parker, J.*, at February Term, 1927, of RUTHERFORD. No error.

Action on a policy of fire insurance. The verdict, which includes sixteen issues, established these facts: (1) The delivery of the policy to B. H. Aldridge on 22 April, 1925; (2) the policy was applied for by the *feme* plaintiff and issued in the name of her husband by consent and with her approval; (3) the defendant knew when the policy was applied for and issued that the plaintiffs were husband and wife and were the owners of the insured property, and the policy was issued by agreement in the name of B. H. Aldridge for the protection of both plaintiffs; (4) when the policy was issued there was a debt outstanding on the insured building; (5) this was known to the defendant when the policy was applied for and issued; (6) in the building and the land on which it stood the plaintiffs had an estate by entireties subject to a deed of trust for $500; (7) the defendant waived the condition that the policy should be void if the interest of B. H. Aldridge in the building was other than sole and unconditional ownership or not an estate in fee; (8) the insured property, real and personal, was destroyed by accidental fire on 21 June, 1925; (9) the value of the building was $4,000; (10) no part of the personal property was encumbered by a chattel mortgage; (11) the personal property was owned by the plaintiffs; (12) a piano and furniture of the value of $196 was encumbered by an unregistered conditional sale contract; (13) the defendant waived the condition of sole ownership in the personal property; (14) also the condition that it would not be liable if the property was encumbered; (15) the value of the personal property in the conditional sale contract was $479; (16) the value of the destroyed personal property was $2,695.

The policy contained the following provisions: "This entire policy of insurance shall be void unless otherwise provided by agreement in writing hereto: (a) If the interest of the insured be other than unconditional and sole ownership; (b) if the subject of insurance be a building on ground not owned by the insured in fee simple, or (c) if with the knowledge of the insured foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed. Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage to any property insured hereunder encumbered by chattel mortgage and during the time of such encumbrance this company shall be liable only for loss or damage to any other property insured hereunder. No one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement added hereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added thereto, nor shall any provision or condition of this policy or any forfeiture be held to be waived by any requirement, act or proceeding on the part of this company relating to the appraisal or any examination herein provided for, nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto."

Upon the verdict judgment was given for the amount of the policy ($5,000 with interest from 21 June, 1925), and the defendant appealed upon assignments of error referred to in the opinion.

Edwards & Dunagan, W. C. Newland, S. J. Erwin and S. J. Erwin, Jr., for plaintiffs.
W. C. McRorie for defendant.

ADAMS, J. The complaint was filed on 12 December, 1925, and the answer 2 January, 1926. At a special term of the Superior Court held in December, 1926, the *feme* plaintiff was made a party and leave was granted the plaintiffs to reply to the answer. The defendant objected to the order authorizing the replication, apparently on the ground that pleadings must be filed and issues joined before the clerk. Public Laws 1921, Ex. Ses., ch. 92; Public Laws 1923, ch. 53; Public Laws 1924, Ex. Ses., ch. 18. These statutes have reference to the clerk and were not intended to impair the broad powers conferred on the judge, who "may in his discretion and upon such terms as may be just allow an answer or reply to be made, or other act done, after the time limited or by an order to enlarge the time." C. S., 536; *McNair v. Yarboro,* 186 N. C., 111; *Cahoon v. Everton,* 187 N. C., 369; *Battle v. Mercer, ibid.,* 437; *Roberts v. Merritt,* 189 N. C.,194; *Butler v. Armour,* 192 N. C., 510. The order was an exercise of the court's discretion and will not be disturbed.

Although the policy designated B. H. Aldridge as the insured, evidence was admitted on behalf of the plaintiff tending to show that Mrs. Aldridge had applied for the insurance, had told the agent that the property was encumbered with a debt of one thousand dollars; that she and her husband owned the property, and that the policy might be issued in the name of herself, in the name of her husband, or in the names of both. To this evidence the defendant excepted for the avowed reason that it tended to establish a parol contract of insurance and necessarily to vary the terms of the policy; also because it was incompetent as proof of the defendant's waiver of the conditions on which the policy might be forfeited. Closely related are exceptions to instructions based upon this and similar testimony—all these exceptions assailing the sufficiency of evidence in support of the defendant's alleged waiver.

Waiver is a voluntary and intentional relinquishment of a known right and implies an election to dispense with something of value or to forego some advantage which might be demanded. 27 R. C. L., 904. "Where a ground exists upon which the company may have the right to avoid or forfeit the policy, it may with knowledge thereof intentionally relinquish its right, or its conduct may justify insured in the belief that it does not intend to take advantage of it; hence it may be estopped from claiming that the policy is avoided or forfeited if insured acts in reliance upon this belief to his prejudice. The courts being loath to enforce a forfeiture are prompt to seize upon any circumstances which indicate a waiver on the part of the company, or which will raise an estoppel against it." 32 C. J., 1315, sec. 565.

It is true that under certain conditions the terms set out in a policy of insurance can be waived only in the manner prescribed by the contract *(Black v. Ins. Co.,* 148 N. C., 169); but the provisions which usually restrict the agent's power of waiver do not as a rule apply to an agent who has knowledge of conditions existing at the inception of the contract. These conditions may be waived by the agent although embraced in the policy when it is delivered, for in these circumstances the agent's knowledge is the knowledge of his principal. *Smith v. Ins. Co.,* 193 N. C., 446; *Bullard v. Ins. Co.,* 189 N. C., 34; *Insurance Co. v. Lumber Co.,* 186 N. C., 269; *Johnson v. Ins. Co.,* 172 N. C., 142. Applying this principle to the evidence, neither in the admission of the testimony nor in the instructions to which the exceptions relate have we discovered any sufficient or satisfactory cause for awarding a new trial.

The defendant contends, however, that if this be conceded the action, nevertheless, should have been dismissed as in case of nonsuit. Its position is that the plaintiffs neither referred to the deed of trust as an encumbrance on the property nor made known to the defendant the nature of their title, and that the defendant could not therefore have intended to waive its right to insist upon the forfeiture. In regard to the first proposition it may be said that the defendant's agent had been definitely informed that the plaintiffs were "in debt $1,000 on this property." Whatever the nature of the indebtedness the agent was put on his guard; and even if the character of the outstanding encumbrance was not described it would still be inequitable to permit a forfeiture of the policy for the reason which the defendant assigned. And in reference to the second proposition it is immaterial in our opinion whether the agent or the plaintiffs understood the nature of an estate by entireties; the decisive fact is the information given to the agent as shown by the testimony of Mrs. Aldridge. In her conversation with him she said: "You can make it (the policy) to me or to my husband, or to both of us. . . . I told him it (the property) was ours, he could make it (the policy) to me or my husband, or make it to both of us, it did not make any difference which one he made it to, because what was one's was the other's."

This evidence, while perhaps not as comprehensive as the plaintiffs contend, was submitted to the jury on the question of the joint ownership of the property, the defendant having offered no testimony, and the issue, under instructions free from error, was answered in favor of the plaintiffs. The case of *Hardin v. Ins. Co.,* 189 N. C., 423, cited by the defendant, is easily distinguishable and calls for no special comment.

The issues, sixteen in number, covered all phases of the controversy, and we find in the record no assignment of error which requires another trial.

No error.

R. L. JARVIS v. ERWIN COTTON MILLS COMPANY.

(Filed 14 December, 1927.)

1. **Master and Servant—Employer and Employee—Sufficient Help—Nondelegable Duty.**

   The master is required, as a nondelegable duty, to furnish, in the exercise of reasonable care, his servant with sufficient help to perform the duties required of him.

2. **Same—Evidence—Nonsuit.**

   Where the master has given his servant, long experienced in the work, the right to call on other like employees readily accessible in sufficient numbers, to assist him in piling heavy loom beams in a cotton mill, and the evidence tends only to show that the servant selected the place and called upon his foreman to help in the work, who told him to call another, in compliance with which the servant called only one man to help him, and in piling the beams in the usual manner the servant was injured, alleged to have been caused by insufficient help, in his action against the master to recover damages for this injury: *Held,* the defendant's motion as of nonsuit should have been allowed, and the fact that theretofore the plaintiff had complained to his master of insufficient help does not vary the result.

CIVIL ACTION, before *Harding, J.,* at July Term, 1927, of DAVIDSON.

This was an action for damages instituted by the plaintiff, alleging in substance that on or about 8 December, 1925, while in the employ of the defendant, he was required to lift loom beams and stack them six high. These beams weighed from 285 to 300 pounds. The height of the stack was about four and one-half feet.

The evidence tended to show that plaintiff called another workman to his assistance, and while they were attempting to place the last beam on the stack that he was ruptured. Upon appropriate issues there was a verdict for plaintiff and an award of damages in the sum of $4,000.

From judgment upon the verdict defendant appealed.

Walser & Walser and Phillips & Bower for plaintiff.

Manly, Hendren & Womble, A. T. Grant and Raper & Raper for defendant.

BROGDEN, J. What duty is imposed upon an employer with reference to the sufficiency of help furnished an employee? The general rule is that it is the duty of an employer of labor to exercise ordinary care in furnishing to an employee adequate help or assistance in the performance of the work required of such employee. This duty is primary and nondelegable and ranks in importance with the duty of an employer to exercise ordinary care in furnishing a safe place to work. The question has been considered by this Court in many decisions, notably the following: *Bryan v. R. R.,* 128 N. C., 387; *Shaw v. Mfg. Co.,* 146 N. C., 235; *Pigford v. R. R.,* 160 N. C., 93; *Brown v. Foundry Co.,* 170 N. C., 38; *Hollifield v. Tel. Co.,* 172 N. C., 714; *Cherry v. R. R.,* 174 N. C., 263; *Winborne v. Cooperage Co.,* 178 N. C., 88; *Strunks v. Payne,* 184 N. C., 582; *Hines v. R. R.,* 185 N. C., 72; *Crisp v. Thread Mills,* 189 N. C., 89; *Bradford v. English,* 190 N. C., 742; *Johnson v. R. R.,* 191 N. C., 75; *Barrett v. R. R.,* 192 N. C., 728; *Clinard v. Electric Co.,* 192 N. C., 736. These cases present a variety of circumstances. In some of them the sufficiency of help furnished is combined with a failure to furnish proper tools and appliances. In others the employee was inexperienced. In all of them, with few exceptions, there was a request by the employee for more help and the request was either denied or ignored.

The law in other jurisdictions discloses a divergence of judicial thought upon the question. Many of the pertinent decisions may be found in an annotation to *Tony Williams v. Ky. River Power Co.,* 200 S. W., 946, 10 A. L. R., 1396. The head-note to that case discloses that the Kentucky Court held: "An employee directed to carry plank cannot hold the employer liable for hernia caused by the work being beyond his strength, although when directed to do the work he protested that it was too heavy." Denial of recovery in this line of cases is usually based upon the theory that the employee assumed the risk, for the reason that the workman himself is the best judge of his own strength, or certainly as capable of judging his own strength as the employer.

An examination of our decisions upon the subject, however, will demonstrate that the rule of liability is much stricter in this jurisdiction, perhaps, than that recognized by the weight of authority in other states. In order to determine the merits of the controversy in the present case it is necessary to recur to the facts appearing in the record. The plaintiff operated a slashing machine. In the same room were seven other employees. It was a part of his duty to stack loom beams. These beams weighed from 285 to 300 pounds. The beams were stacked by laying two on the floor, two across, and two on top of these, making six in each stack. The completed stack was about four and one-half feet high. Plaintiff's narrative of his injury is as follows: "As I was bringing the third beam out to roll it up on the other two Mr. Griffin (foreman) said: 'Do not lay it up there; put it up on the stack,' and I said, 'Can you help us?' and he said, 'No, get somebody else,' and I looked around to see who I could get, and I called Mr. Heller, and me and him picked up one off the floor and started with another to fill the space here inside, and I laid it up against the end of the beam and Mr. Heller stepped around and kinder lifted it up on top of this full stack, extended out here where I couldn't get any room, and threw it up, and I was standing up against it. I did not have any room to get in and Mr. Heller was on the other end. When putting them up I felt something tear in my side, and tore so I could not get up with the second loom beam; I put up the first one all right. . . . I asked him (foreman) to help me, and he said 'Get some one else,' and walked off. I looked around and all the fellows there were busy with machines, and Mr. Heller was working there, and I called him, and he came over there and helped me to lay them up."

In regard to the place in which the beams were stacked, plaintiff testified that another employee and himself "started the stack. He and I selected the place. . . . Click and I started the stack at which I got hurt." In regard to his experience in such work, plaintiff testified, "that he had worked twelve or fifteen years at the mill and had been stacking these beams in the same manner for eight years." The record shows the following in regard to this aspect of the case: "(Q.) You stacked them like they had been stacked for eight years? Yes, I have been stacking them in stacks. (Q.) Just like you did that day? Yes, I reckon it was like I did that day. I have worked in the slasher room altogether twenty years." In regard to the sufficiency of help in the room at the time plaintiff testified: "Any of the slasher machine men helped—any of them in the room there helped around the slasher machine—helped stack them. . . . I have helped stack the beams before. . . . At the time I undertook to put the loom beam on the stack there were seven men in the room, . . . other people in the room helped me at times; I had not been told to call a third man when I went to put on top beams; two did that when we could not get some one to help us; got a third man if somebody we could get. . . . I didn't ask any of the other men. Heller and I went there to put them up; cannot tell how many times two men have put up top pieces—lots of times. When the other fellows would be busy at machines, a couple of us would raise them up. I have been doing this for fifteen years."

Heller, the coemployee, who helped plaintiff stack the beams, testified for the defendant as follows: "The rule of the room about calling on each other for help is, they call a man for help, and when he is wanted you can get him—call on each other for help. That morning Jarvis did not call on anybody at all to help him but me." The overseer of the room, testifying for the defendant, said: "If a man is called to help it is his duty to help."

The foregoing testimony, quoted from the record, discloses:

1. That the plaintiff was an experienced employee and had been stacking beams of like character and in an identical manner for at least eight years.
2. That there were presently available and subject to plaintiff's request five other men besides the foreman, and that it was the duty of these men to assist each other in stacking beams.
3. That the foreman did not instruct the plaintiff to proceed with the work, but as a matter of fact instructed him to get other help.
4. That the plaintiff himself chose such help as he thought was sufficient to enable him to lift the beams.

It is true that the plaintiff testified that he "complained several times before about getting more help; told them that the beams were too heavy for two men to handle them," but upon the morning of his injury the plaintiff asked the foreman to help him and the foreman told him "to get somebody else," and thereby plaintiff was instructed to get such help as he thought reasonably necessary.

Under these facts and circumstances we hold that, when an employer has provided for the use of an experienced employee, sufficient help then presently available, and subject to the request of such employee, the employer has discharged the obligation imposed upon him by law with respect to furnishing adequate assistance in discharging the work required of the employee. From the facts appearing in the record we therefore hold that the motion of nonsuit made by the defendant at the conclusion of the entire evidence should have been allowed.

Reversed.

STATE v. CHARLIE SHEW.

(Filed 14 December, 1927.)

1. **Criminal Law—Verdict—Judgment—Sentence—Reversal.**

Where the verdict in an indictment charging the receiving of stolen goods knowing them to have been stolen, is "guilty of receiving stolen goods," it is defective as not being responsive to the charge or falling within the requirements of the statute to constitute the offense made in the indictment, and thereon a judgment may not be entered or a sentence imposed.

2. Same—Appeal and Error—Instructions—Venire de Novo—Courts.

Where the verdict in a criminal action is not sufficient to support a judgment, it should not be received by the court, but returned to the jury with instructions so that it may be remedied, and where the judge has received the verdict, on defendant's appeal, a *venire de novo* will be ordered.

3. Criminal Law—Judgments—Defect—Procedure.

Where the count in an indictment is insufficiently alleged, it may then be cured by the solicitor's sending a correct bill to the grand jury.

APPEAL by defendant from *McElroy, J.*, at August Term, 1927, of WILKES.

Criminal prosecution tried upon an indictment charging the defendant (1) with the larceny of an automobile, the property of "a party to the jurors unknown"; and (2) with receiving said automobile, the property "of the party unknown," knowing it to have been feloniously stolen or taken in violation of C. S., 4250.

Verdict: "Guilty of receiving stolen goods."

Judgment: Imprisonment in the State's prison, at hard labor, for a term of not less than two nor more than three years.

After trial the defendant employed counsel, who lodged motions (1) in arrest of judgment, alleging that the second count in the bill of indictment is defective; and (2) for a *venire de novo* on the ground that the verdict is not sufficient to support a judgment. Motions overruled and defendant appeals.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. Hubert Whicker, F. J. McDuffie and Trivette & Comer for defendant.

STACY, C. J. Consideration of the question as to whether the second count in the bill of indictment is defective, as alleged, is omitted, for the reason that the verdict is insufficient to support a judgment, which necessitates awarding a *venire de novo,* and, with respect to the alleged defect, if any exist, the solicitor can easily cure same by sending another bill to the grand jury.

A similar verdict in almost exact form as the one now presented, was before the Court in the case of *S. v. Whitaker,* 89 N. C., 472. There, the defendant was charged (1) with the larceny of a quantity of cotton, the property of one James H. Parker, and (2) with feloniously receiving said cotton knowing it to have been stolen. The jury returned the following verdict: "Guilty of receiving stolen cotton." Speaking to the insufficiency of the verdict as a basis for judgment, *Ashe, J.,* delivering the opinion of the Court, said: "It is not sufficiently responsive to the issue; and whenever a verdict is imperfect, informal, insensible, or one that is not responsive to the indictment, the jury may be directed to reconsider it with proper instructions as to the form in which it should be rendered (citing authorities). But if such a verdict is received by the court and recorded, it would be error to pronounce judgment upon it. The most regular course would be to set aside the verdict and order a *venire de novo*."

Again, in *S. v. Parker,* 152 N. C., 790, 67 S. E., 35, the defendant was indicted for carrying a concealed weapon in violation of the statute. The verdict returned by the jury was "guilty of carrying a pistol in his suitcase." This was held to be insufficient to support a judgment. In a clear and forceful opinion *Walker, J.,* speaking for the Court, quotes with approval from *S. v. Newsome,* 3 W. Va., 859, as follows: "We cannot approve of taking from a citizen his liberty upon a verdict that neither alludes to the indictment nor uses language to show a conviction of the crime charged therein. If the jury intended to find the defendant guilty of the offense as charged in the indictment, they should have said so, and the court should have seen that the verdict so declared, or should have refused to receive it."

The pertinent authorities were again reviewed in *S. v. Gregory,* 153 N. C., 646, 69 S. E., 674.

Agreeable with these decisions a *venire de novo* must be awarded.

Venire de novo.

PEOPLES BANK AND TRUST COMPANY v. F. E. DUNCAN ET AL.

(Filed 14 December, 1927.)

1. **Bills and Notes — Government — Illegal Contracts — Consideration — Statutes.**

Under the provisions of the Federal Statute, a contract for the carrying of the United States mail is not assignable, and in an action brought upon a note given in part consideration of such assignment this may be shown as a failure of consideration, except as against a holder for value, in due course, without notice. C. S., 3008.

2. **Same—Evidence—Holder in Due Course—Instructions—New Trials—Appeal and Error.**

To become a holder of a negotiable instrument in due course, it is required (C. S., 3033), that the purchaser must have acquired it without notice of the infirmity in the instrument, and where there is evidence on the trial of the action that he had such notice, the question is for the determination of the jury under correct instructions from the judge, and a failure to instruct thereon is reversible error.

APPEAL by defendants from *Moore, J.*, at Spring Term, 1927, of WATAUGA. New trial.

T. C. Bowie and C. W. Higgins for appellants.

ADAMS, J. The plaintiff brought suit to recover the amount alleged to be due on two promissory notes, each in the sum of $250, dated 4 November, 1924, due respectively six and twelve months after date. The notes were executed and delivered to James Lovell by F. E. Duncan in part payment of an agreed price for Lovell's transfer and assignment of his contract with the Postoffice Department for transporting the mail between Boone and Lenoir. It was alleged that the defendant Hodges was one of the makers and that the defendants Heller and Lovell were indorsers. The plaintiff claimed to be the holder of the notes in due course.

Mail contracts are not assignable. "No contractor for transporting the mail within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void." R. S., 3963, Compiled Statutes, 7451, 8 Fed. Stat. Ann., 3963. As the assignment was void, the contract between Lovell and Duncan was not supported by a sufficient consideration. It is provided by statute that absence or failure of consideration is matter of defense against any person not a holder in due course. C. S., 3008. A holder in due course is one who has taken the instrument on condition that it was complete and regular upon its face; that he became the holder before it was overdue and without notice of any previous dishonor; that he took it for good faith and value, and without notice of any infirmity in the instrument or defect in the title at the time it was negotiated. C. S., 3033. The jury was given this instruction: "The evidence is that they (the plaintiffs) bought the notes in a few days after they were given, and before they were due, and before they were dishonored, and that they paid value for them, and you will answer the issue Yes in the sum of $500 with interest from the time the notes became due, if you find that to be true." This instruction omits the chief contention upon which the defendants relied—that is, that the plaintiff at the time it negotiated the notes had notice of the infirmity in the contract and the consequent failure of consideration. There was distinct evidence in support of this contention. Lovell testified: "On or about the day I received these notes from Mr. Duncan I took them to the plaintiff's bank and asked the cashier if the bank would cash them for me. At this time I told him that the notes had been given to me by Mr. Duncan in part payment of my star mail route contract and described my transaction with Mr. Duncan substantially as I have already described it in this deposition." Similar error was committed in excluding the proposed testimony of Duncan to the same effect. The notes are not set out in the record, but we have assumed that they were negotiable. For the error complained of there must be a

New trial.

PARKER R. ANDERSON v. J. M. CHILES AND THE KENILWORTH COMPANY.

(Filed 14 December, 1927.)

Contracts—Pleadings—Evidence—Actions—Public Policy—Government.

Where the complaint declares upon one contract under which plaintiff claims compensation for services rendered, he may not recover upon a different contract not alleged in the complaint relating to the same subject-matter, the probater without the *allegata* being vitally defective. As to whether the contract in this case to induce public officials to enter into it in behalf of the United States government, was *contra bonos mores* or against public policy, is not decided.

APPEAL by plaintiff from *Raper, Emergency Judge,* at February Term, 1927, of BUNCOMBE. Affirmed.

Action upon contract for personal services rendered by plaintiff to defendants relative to the purchase of the Kenilworth Hotel, located in Buncombe County, N. C., by the United States.

At the close of plaintiff's evidence defendants' motion for judgment as of nonsuit was allowed.

From judgment dismissing the action, as upon nonsuit, plaintiff appealed to the Supreme Court.

Kitchin & Kitchin and Galloway & Galloway for plaintiff.
Merrimon, Adams & Adams for defendants.

CONNOR, J. The cause of action alleged in the complaint is the breach of a contract entered into by and between plaintiff and defendant, J. M. Chiles, acting in his own behalf and as an agent or officer of his codefendant, the Kenilworth Company, on or about 11 March, 1921. At this time the Kenilworth Hotel, located in Buncombe County, N. C., and owned by the defendant corporation, was held, used and occupied as a hospital by the United States Public Health Service, under a lease from the owner. Defendants wished to enter into negotiations with authorized officers of the government for the sale of said hotel to the United States. By his contract with defendants, as alleged in the complaint, plaintiff undertook to aid defendants in making said sale by interesting officers of the government in the purchase of said hotel.

In his deposition offered at the trial as evidence in his behalf, plaintiff testified as follows: "I maintain that I had two contracts with Mr. Chiles. I am not claiming under both these contracts; the first contract was superseded by the second." The evidence tended to show that the negotiations for the sale of the hotel ended in July, 1921; the offer of defendants to sell the hotel to the United States was declined. Defendants thereupon undertook to procure the cancellation of the lease, the return of the hotel to defendant corporation, and payment by the government of damages resulting from the use of the hotel as a hospital. Plaintiff testified that the second contract, which superseded the first contract alleged in the complaint, was then entered into by and between plaintiff and defendants. The evidence offered by plaintiff, both by his deposition and by the deposition of Mr. Morgan, tended to show the performance by plaintiff of the second contract, to which no reference is made in the complaint. It is upon this contract that plaintiff now seeks to recover in this action.

The motion for judgment as of nonsuit was properly allowed, for there is a fatal variance between the allegations of the complaint, and the proof offered by plaintiff, with respect to the contract upon which he seeks to recover.

In *Sumrell v. Salt Co.,* 148 N. C., 552, it is said in the opinion of this Court: "It is elementary that a plaintiff may not declare upon one contract and, without amendment, recover upon another. If the rules of pleadings were otherwise, a defendant would never be able to prepare his defense." The judgment must be affirmed upon this principle, which is applicable upon this record.

It is not necessary for us to consider or to discuss the further ground upon which defendants contend that the judgment should be affirmed. We do not decide whether the contract as alleged in the complaint, or as proven by the evidence, is void, for that it is *contra bonos mores* or in contravention of public policy. It is well settled that agreements to procure contracts by secret influence upon public officers authorized to make them for the benefit of individuals are void; the courts will not enforce such agreements, nor will they grant relief in actions arising out of such agreements. These principles are too well-settled in the law to require citation of authorities to sustain them. Whether or not they are applicable to the contract for the breach of which plaintiff seeks to recover in this action, is not necessarily presented for decision upon this record. We therefore do not decide this question.

There was no error in allowing the motion for nonsuit. The judgment dismissing this action is

Affirmed.

WALTER HURT, BY HIS NEXT FRIEND, S. A. HURT, v. WESTERN CAROLINA POWER COMPANY AND SOUTHERN POWER COMPANY.

(Filed 14 December, 1927.)

1. **Negligence—Proximate Cause—Ponding Waters—Health—Instructions—Appeal and Error.**

   In an action to recover damages for the consequent sickness or ill health of the plaintiff resulting from the alleged negligence of the defendant power company in damming a stream and constructing its plant, the question of proximate cause is a vital element in order for him to recover, and an omission so to charge upon the evidence in the case is reversible error.

2. **Damages—Parent and Child—Infants—Negligence.**

   An unemancipated infant can recover only such permanent damages for an injury as may result to him after his majority.

APPEAL by defendants from *Moore, J.,* at July Term, 1927, of McDOWELL.

Civil action (companion suit to *Godfrey v. Power Co.,* 190 N. C., 24, 128 S. E., 485) to recover damages for an alleged negligent injury to plaintiff, a minor 17 years of age, resulting in sickness, loss of time, diminished earning capacity, expenses, etc., caused by the negligent manner, so plaintiff alleges, in which the defendants have constructed their dams, waterworks and hydro-electric power plant along the Catawba River near the vicinity of plaintiff's home, diverting and ponding the waters of said river and leaving them in such negligent condition as to cause the breeding of anopheles mosquitoes and the spread of malaria and sickness to the inhabitants, including the plaintiff, throughout the surrounding territory.

Upon denial of liability, and issues joined, the jury returned the following verdict:

"1. Was plaintiff injured by the negligent conduct of the defendant as alleged in the complaint? A. Yes.

"2. What damage, if any, is plaintiff entitled to recover? A. $1,000."

From a judgment on the verdict in favor of plaintiff, the defendants appeal, assigning errors.

Morgan & Ragland for plaintiff.

Hudgins, Watson & Washburn, Pless, Winborne, Pless & Proctor, W. S. O'B. Robinson, Jr., and J. H. Marion for defendants.

STACY, C. J. The validity of the trial is called in question by numerous exceptions and assignments of error, but we shall not consider them *seriatim,* as it is necessary to award a new trial for errors in the charge on the issues of negligence and damages.

With respect to the liability of the defendants for plaintiff's injuries, the following excerpt from the court's charge to the jury, constitutes one of defendants' exceptive assignments of error:

"Now, if you find, gentlemen of the jury, by the greater weight of the evidence, that they (the defendants) did create malaria-bearing mosquitoes by reason of the impounding of the water in this way that breeded and was capable of breeding and did breed malaria-bearing mosquitoes, why, then, if you find that by the greater weight of the evidence, they (the defendants) would be guilty of negligence."

The vice of this instruction lies in the fact that it makes no reference to proximate cause. One may be ever so negligent, but unless such negligence proximately produces injury to another, no action for damages may be maintained therefor. *Drum v. Miller,* 135 N. C., 204, 47 S. E., 421. In other words, to constitute actionable negligence, there must be both negligence, or a breach of some legal duty, and injury proximately resulting therefrom.

Speaking to the question in *Ramsbottom v. R. R.,* 138 N. C., 39, 50 S. E., 448, *Hoke, J.,* delivering the opinion of the Court, said: "To establish actionable negligence, the question of contributory negligence being out of the case, the plaintiff is required to show by the greater weight of the testimony, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiffs under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances and charged with like duty; and, second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed." This is still the law with the modification contained in *Drum v. Miller, supra,* and many other cases "that it is not required that the particular injury should be foreseen, and it is sufficient if it could reasonably be contemplated that injury or harm might follow the wrongful act." *Hudson v. R. R.,* 176 N. C., 488, 97 S. E., 388; *Gore v. Wilmington, ante,* 450.

Again, on the issue of damages, the jury was instructed as follows:

"In this class of cases the plaintiff is entitled to recover as damages one compensation for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual loss of time, nursing and medical expenses, or loss from inability to perform ordinary labor, or capacity to earn money. Plaintiff is to have a reasonable satisfaction, if he be entitled to recover, for loss of both bodily and mental powers or for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury and this is for the jury to say under all the circumstances what is a fair compensation, what is a fair, reasonable sum which defendant ought to pay to the plaintiff by way of compensation for the injury he has sustained; the age and occupation of the plaintiff or injured party, nature and extent of his business, the value of his services, the amount he was earning from his business or realized from fixed wages at the time of the injury, whether he was employed at all or not, whether he was employed at a fixed salary or a professional man, are matters properly to be considered."

A similar instruction, in almost identical language, was held for error in *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339, where the plaintiff, as he is here, was an unemancipated minor, living with his parents. There, it was said: "The charge is defective in that it fails to limit the plaintiff's recovery to the present worth of a fair and reasonable compensation for his mental and physical pain and suffering, if any, and for his permanent injuries, if any, resulting in the impairment of his power or ability to earn money after reaching his majority."

It seems to be the universal holding that an unemancipated infant cannot recover, as an element of damages in an action for personal injuries, for loss of time or diminished earning capacity during his minority. *Gillis v. Transit Corp.,* 193 N. C., 346, 137 S. E., 153; *Hayes v. R. R.,* 141 N. C., 195, 53 S. E., 847. The father is entitled to the services and earnings of his minor child so long as the latter is legally in his custody or under his control and not manumitted. *Floyd v. R. R.,* 167 N. C., 55, 83 S. E., 12; *Williams v. R. R.,* 121 N. C., 512, 28 S. E., 367.

For the errors, as indicated, there must be a new trial, and it is so ordered.

New trial.

WINCHESTER-SIMMONS COMPANY v. L. H. CUTLER ET AL.

(Filed 14 December, 1927.)

Estates—Entirety—Husband and Wife—Personal Property—Wills—Interpretation—Intent.

Under a bequest of personal property to husband and wife by entireties, the beneficiaries acquire the property as tenants in common, the law not applying to doctrine of survivorship except upon a devise of realty, and a clause in connection therewith "to have and to hold" the bequest to their survivors in fee simple, is but a statement of the incidents of an estate by entireties to husband and wife, the controlling intent of the testator, and does not vary its result.

CONNOR, J., and STACY, C. J., dissenting.

CIVIL ACTION, before *Harris, J.,* at August Term, 1927, of CRAVEN.

The judgment of the court contains all the essential facts and is as follows:

"This cause coming on to be heard before his Honor, W. C. Harris, judge of the Superior Court, riding the Fifth Judicial District, at Greenville, N. C., on 22 August, 1927, and being heard on the appeal from the judgment of L. E. Lancaster, clerk of the Superior Court, and on the notice to show cause, issued by his Honor, Judge Nunn, as to why a receiver should not be appointed, and being heard on the evidence, record and arguments of counsel for plaintiff and of counsel for defendant, the court finds the following facts:

1. That Sarah L. Wadsworth died domiciled in Craven County in October, 1926, leaving a last will and testament, appointing the defendant, L. H. Cutler, Sr., and defendant, E. W. Wadsworth, executors, who qualified on 4 November, 1926, and gave the notice to creditors, required by law, which will expire (one year) from date of qualification.

2. That by arrangement between the defendant, L. H. Cutler, Sr., and the defendant, E. W. Wadsworth, L. H. Cutler, Sr., has been in active charge of the administration of said estate, which seems to be solvent.

3. That item nine of the will of said Sarah E. Wadsworth is as follows:

Item 9. To my husband's friend, L. H. Cutler, who since the death of my beloved husband, and at this time for a period of about eleven years, has not only been a most true and faithful friend to me, but has as my business agent attended to every detail of my estate and all of my affairs saving me every care and responsibility in all the affairs of my life, and this he has done not only in most strictly correct and faithful manner, but without charge or compensation of any kind; and, therefore, not so much in compensation but in recognition of his long valued and faithful service and friendship, I do devise and bequeath unto him, the said L. H. Cutler and wife, Laura D. Cutler, as husband and wife by entireties, all that certain house and lot in the city of New Bern, number sixty-eight (No. 68) Metcalf Street, and ten thousand dollars of my North Carolina four per cent bonds of par value, to have and to hold the same real estate and bonds to them as husband and wife by entireties and to the survivor of them in fee simple.

4. That the defendant, L. H. Cutler, Sr., hypothecated one $1,000 North Carolina four per cent bond to the National Bank of New Bern, and one like bond to the Citizens Bank and Trust Company, of New Bern, for the approximate value of the respective bonds, and said bonds are now so held as collateral for said debts, which are unpaid; that the proceeds of said loans was used by said Cutler for repairs to the said Laura D. Cutler's property upon which said defendant and wife live. Said bonds were taken without the knowledge of the court.

5. That in addition to said bonds said L. H. Cutler, as executor, by direction of the court, hypothecated two $1,000 bonds to the National Bank of New Bern and borrowed thereon about $1,800 to pay the inheritance or succession taxes on the said estate, $980 of said amount borrowed being the inheritance tax on the devise and bequeaths aforesaid to L. H. Cutler and wife, Laura D. Cutler.

6. That said L. H. Cutler contends he has no other property than his interest under said devise, but this court does not find the fact whether he has other property or not.

7. That said L. H. Cutler was at the time of the qualification, and now is, indebted to the estate of said Sarah E. Wadsworth in the sum of $2,000 secured by mortgage on real estate.

8. The defendant, L. H. Cutler, Sr., is 79 years of age and in good health, and the defendant, Laura D. Cutler is 75 years of age and in good health.

The court being of the opinion that under said item of said will the said Laura D. Cutler took, subject to the debts of the estate, $5,000 in North Carolina four per cent bonds absolutely, and said L. H. Cutler took a like $5,000 absolutely, with no remainder over after the death of either of said defendants:

It is thereupon considered by the court, and ordered that the receivership be continued as to $5,000 of the North Carolina four per cent bonds, left by said Sarah E. Wadsworth, deceased, to the said L. H. Cutler; and Laura D. Cutler be, and she is hereby discharged and her interest in the estate is hereby discharged from said receivership; that said receiver have and hold said bonds and any other property of L. H. Cutler, if any, subject to the rights of the creditors and the debts of the estate and hold them for the benefit of the plaintiff, as a creditor, excepting, however, the personal property exemption to be assigned to said L. H. Cutler out of said bond. Said $5,000 to be delivered to the receiver immediately upon the filing of this judgment with the court."

To the foregoing judgment both plaintiff and defendant excepted.

Ernest M. Green for plaintiff.

Whitehurst & Barden and Ward & Ward for defendants.

BROGDEN, J. The primary question in the case is whether or not an estate by entirety can be created in personal property.

The question is raised by Item 9 of the last will and testament of Sarah E. Wadsworth and involves a legacy of $10,000 of North Carolina four per cent bonds. There is no controversy with respect to the devise of real estate contained in Item 9.

In *Turlington v. Lucas,* 186 N. C., 283, this Court held that an estate by entirety in personal property was not recognized in North Carolina. This decision was handed down subsequent to the execution of the will in controversy. The divergence of judicial opinion upon the question is referred to by *Clarkson, J.,* in *Turlington v. Lucas.* There is also an instructive note upon the question in the North Carolina Law Review of April, 1924, p. 195. It would serve no useful purpose to reopen the debate or to reëxamine the authorities as the question is no longer an open one after the decision in *Turlington v. Lucas.* Many of the decisions upon the point are classified in a note to the case of *George v. Dutton,* 108 Atlantic, 515, and annotated in 8 A. L. R., 1017. The annotater in that case says: "As stated in the next preceding subdivision of this annotation, the decided weight of authority is to the effect that estates by the entirety may exist in personalty as well as in realty." North Carolina is classified under this statement as holding that estates by entirety in personal property are valid. Two cases from this State are cited in support of the proposition, to wit, *West v. R. R.,* 140 N. C., 620, and *Jones v. Smith,* 149 N. C., 318. There are declarations in the cases which would perhaps warrant the inference that our Court has applied the doctrine of entirety to personal property. For instance, in the *West case, supra, Clark, C. J.,* after discussing the incidents of an estate by entirety in land, said: "As to personalty the same rule applies, and where shares of stock stand in the joint names of husband and wife he is entitled to the dividends during their joint lives." However, *Chief Justice Clark* wrote the case of *Kilpatrick v. Kilpatrick,* 176 N. C., 182, using the following language: "The briefs of counsel on both sides admit that there is no decision in this State upon the question whether there is an estate by entireties in personalty. The decisions in other states on the point are conflicting. In England the estate by entireties obtained only in realty and has been abolished even as to that." It is apparent, therefore, that the *Chief Justice* never construed *West v. R. R., supra,* as deciding the question. The other case of *Jones v. Smith* involved the right of the partition of lumber manufactured from trees growing on land held by the entirety. *Justice Walker,* writing for the Court, said: "As the plaintiffs were thus seized of the timber, its severance from the land by cutting it did not convert the estate in the trees, when severed, or in the lumber cut from the logs, into a tenancy in common, nor is the *feme* plaintiff, by reason of the severance, entitled to maintain this action for partition." It is clear, we think, by reason of the reference in the *Kilpatrick case, supra,* that this Court has not construed either the *West case* or the *Jones case* as deciding the question, and that it was an open question in this State until the decision in *Turlington v. Lucas, supra.*

The defendants contend that the language in Item 9 "to have and to hold the said real estate and bonds to them as husband and wife by entireties and to the survivor of them in fee simple," by reason of the words, "survivor of them in fee simple," creates a contingent remainder in personal property. Our judgment, however, is that these words simply state the incident of an estate by entirety and that the estate by entirety is the governing thought in said item.

There are other questions as to the hypothecation of some of these bonds, but these involve accounting to be determined at the time of the final settlement of the estate.

Holding, as we do, that there is no estate by entireties in personal property, it necessarily follows that L. H. Cutler and his wife, Laura D. Cutler, took said bonds as tenants in common, and the judgment rendered by the trial court is approved.

Affirmed.

CONNOR, J., dissenting: I do not agree with the Court that the question stated in its opinion is necessarily involved in this appeal. It is now settled by our decisions that an estate by entireties in personal property is not recognized in this State, *Turlington v. Lucas,* 186 N. C., 283, although such estate, with all its incidents as at common law, is recognized, with respect to real property. *Crocker v. Vann,* 192 N. C., 422. It is needless to discuss now whether the distinction is based upon sound principles or is supported by authorities. The distinction is not, in my opinion, determinative of this appeal.

By her will Mrs. Wadsworth bequeathed ten thousand dollars of her North Carolina bonds to L. H. Cutler and his wife, Laura D. Cutler. If no further language had been used by her with respect to the interest which the legatees took under the will, in the bonds, the same would have been held by them, not as owners by entireties, with the incident of survivorship, but as owners or tenants in common. She expressly provides, however, that Mr. and Mrs. Cutler shall have and hold the bonds, not only as husband and wife, but also by entireties, and to the survivor in fee simple, or absolutely. Her intention with respect to the estate or interest in the bonds which they should take under her will, is manifest. Such intention ought not, in my opinion, to be defeated by a construction of her language, used in her will, which results in holding as a matter of law that Mr. and Mrs. Cutler take the bonds as tenants in common, and deprives them of their joint estate or interest in the bonds, during their lives, and further deprives the survivor of his or her absolute estate in the bonds. The estate or interest which Mr. and Mrs. Cutler take in the bonds, is determined not by the law, but by the language of the testator, which shows her intention as to such estate or interest.

I am authorized to say that STACY, C. J., concurs in this dissent.

H. L. PALMER v. J. G. LOWE AND CRUNDEN-MARTIN MANUFACTURING COMPANY.

(Filed 14 December, 1927.)

1. **Removal of Causes—Transfer of Causes—Venue—Statutes—Nonresidents—Transitory Actions.**

   The venue of a civil action is regulated by statutes passed usually with regard to the convenience of the parties litigant, and the principle of venue in transitory actions has now but little value.

2. **Same—Rights of Sole Resident Defendant—Parties—Residence.**

   Where a nonresident plaintiff brings action against a corporation existing under the laws of another State, with the joinder of a resident defendant of this State, and the venue in the action is laid here in a different county from that of the resident defendant, to recover damages alleged to have been caused by a negligent act, the venue is in the county of the resident defendant, C. S., 469, and the action is removable thereto upon his motion duly made. C. S., 467, 468, 463 not applying.

APPEAL by plaintiff from *Bowie, Special Judge,* at August Term, 1927, of MECKLENBURG. Affirmed.

The defendant Lowe in apt time moved for a change of venue from Mecklenburg to Cabarrus on the following facts:

1. The plaintiff is now, and was at the institution of this action, a citizen and resident of Alabama.

2. The defendant, J. G. Lowe, is now, and was at the institution of this action, a citizen and resident of Cabarrus County.

3. The defendant, Crunden-Martin Manufacturing Company, is now, and was at the institution of said action a corporation organized and existing under the laws of the State of Missouri.

4. This action was instituted by the plaintiff against defendants to recover damages for injuries alleged to have been sustained by the plaintiff on 10 December, 1926, by reason of being injured by an automobile operated by the defendants.

5. The alleged cause of action arose in the county of Mecklenburg.

Upon these facts the judge held as a matter of law that the cause should be removed to Cabarrus County. The plaintiff excepted and appealed.

C. S., 464, provides that actions for the recovery of a penalty or forfeiture imposed by statute and actions against a public officer for an act done by him by virtue of his office must be brought in the county where the cause or some part thereof arose. Section 465 has reference to official bonds, etc., and 466 to domestic corporations. Section 467 contains the provision that an action against a corporation created under the laws of any other State may be brought by a nonresident plaintiff in any county of this State in which the cause of action arose, or in which the corporation usually did business or has property. Section 468 fixes the venue in actions against railroads. Section 469 is as follows: "In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement; or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute."

John M. Robinson for plaintiff.

Palmer & Blackwelder, Tillett, Tillett & Kennedy, and H. M. Jones for the defendant, Lowe.

ADAMS, J. The plaintiff is a nonresident of this State; the Crunden-Martin Manufacturing Company is a foreign corporation; the defendant, Lowe, is a citizen and resident of Cabarrus County. If the suit had been brought against the corporation only, Mecklenburg would have been the proper venue. C. S., 467. If it had been brought against Lowe as the sole defendant, the proper county would have been Cabarrus. C. S., 469. But Lowe and the corporation are joint defendants. Had the plaintiff a right to determine the place of trial by electing between the two counties? It may be granted that a plaintiff may exercise such right when the controlling statute in express terms permits trial of the cause in any one of several counties. *Ange v. Woodmen,* 171 N. C., 40.

The appellant's exception is not to be determined by recourse to the distinction formerly prevailing between local and transitory actions; for in civil actions venue, as a rule, is entirely a matter of legislative discretion and, except in comparatively few instances, the distinction has ceased to be of special importance. That such discretion has been exercised to the extent appearing in the several statutes relating to the subject is admitted. C. S., 463 *et seq.* Title VI of the Code of Civil Procedure, ratified 18 August, 1868, contained three sections fixing the place of trial. Under the first (sec. 66, C. S., 463) the venue is the county in which the subject of the action or some part of it is situated; under the second (sec. 67, C. S., 464), the county in which the cause of action arose; under the third (sec. 68 as first enacted), "the county in which the defendants or any of them shall reside at the commencement of the action; if none of the defendants shall reside in the State, then in the county in which the plaintiffs or any of them shall reside," etc. This section was amended, by inserting "plaintiffs" before "or the defendants" in the second line, and as amended is C. S., 469. Public Laws 1868-69, ch. 59. The purpose of the section as originally enacted and as amended was primarily to serve the convenience of parties residing in the State. This seems to be obvious from subsequent legislation and from subsequent decisions. In 1905 the section was again amended by adding the following: "*Provided,* that in all actions against railroads the action shall be tried either in the county where the cause of action arose or in the county where the plaintiff resided at the time the cause of action arose, or in some county adjoining the county in which the cause of action arose, subject, however, to the power of the court to change the place of trial in the cases provided by statute." Laws 1905, ch. 367; Rev., 424. Concerning this proviso the Court expressed an opinion in *Smith v. Patterson,* 159 N. C., 138—an action against the Southern Railway Company and one of its engineers to recover damages for the death of the plaintiff's intestate caused by the operation of one of the company's engines. The intestate when killed was a resident of Henderson County; the death occurred in the county of Polk; the plaintiff qualified as administrator in Henderson and brought suit in Mecklenburg, the county of his residence. The defendants moved for a change of venue to Henderson, and the motion was denied on the ground that the clause, "where the plaintiff resided at the time the cause of action arose," has reference to the individual holding the office and not to the place where he may have qualified. But the opinion by *Hoke, J.,* proceeds: "Without present decision of this question, however, we are all of opinion that the proviso to the section should be construed and held to apply to cases where a railroad company alone is defendant, and that the venue in actions where there are other parties defendant should come within the body of the act. This is not only the primary and natural meaning of the language used, but without express requirement it would be unreasonable to hold that the rights of all other litigants should be made subservient to a particular class, and this without regard to the convenience of the parties or the amount of the interest involved." If, as suggested, "the convenience of the parties" is to be considered whatever doubt may exist should be resolved in favor of the resident defendant. It is far more just that a foreign corporation be made to defend in his county than that he be required at the election of the corporation to enforce his rights or to redress his wrongs in a county, however remote, in which the corporation may perchance own property or transact its business.

It was probably in deference to the opinion in *Smith v. Patterson, supra,* that the proviso in the act of 1905 was afterwards treated as an independent statute. C. S., 468. In analogy to the reasoning in that case it would seem that C. S., 467, should be construed as fixing the venue of an action against a foreign corporation by a nonresident of the State in the county in which the cause of action arises or in which the corporation does business or has property only in those cases in which the corporation is the sole defendant and not in those in which a resident of the State is jointly sued. We do not conceive it to have been the intention of the Legislature to confer upon a nonresident who has brought suit in the courts of this State against a foreign corporation and has joined as defendant a resident of the State the legal right to have the venue determined upon the theory of a suit between two nonresidents. On the contrary we are of opinion that a systematic view and a reasonable interpretation of the statutes regulating venue subordinate the convenience of nonresident to that of resident defendants. If the only parties are a nonresident plaintiff and a foreign corporation action may be brought in any county in which the cause of action arose, or in which the corporation does business or has property; but if the plaintiff after joining as defendant a resident of the State is permitted in disregard of section 469 to select the venue by virtue of section 467, it is not difficult to perceive how the resident defendant might be subjected to very serious disadvantage. But the contention of the appellee is not based entirely on the argument *ab inconvenienti.* It is in accord with the general rule that if a corporation is sued jointly with another a statute designating the venue in actions against corporations is not controlling. 14 A. C. J., 793, sec. 2879. In *Harrison v. Carbon Timber Co.,* 83 Pac., 215, one of the statutes prescribing venue provided that an action against a corporation might be brought in the county in which the corporation was situated or had its principal office or place of business. In another statute it was provided that "every other action must be brought in the county in which a defendant resides," etc. A corporation and an individual were joined as defendants and it was held that suit had properly been instituted in the county in which the individual defendant resided. Substantially the same conclusion was reached in *Eagle Iron Co. v. Baugh,* 41 So., 663. "The modern trend of all holdings along these lines looks to the convenience of the parties, saving of expense in procuring witnesses, and the acquaintance of jurors with the parties. All matters of this nature require that the litigation should be submitted as nearly as possible to the residence of the parties." *Gumbert v. Sheehan,* 206 N. W., 605. See *Nickell v. District Court,* 210 N. W., 563.

The cases cited by the plaintiff are not decisive of the question. In *Hannon v. Southern Power Co.,* 173 N. C., 520, the plaintiff was a resident of Gaston County in which the action was instituted. C. S., 467(1). The single point presented on the appeal in *Allen-Fleming Co. v. R. R.,* 145 N. C., 37, was whether the justice had acquired jurisdiction by service of summons on the defendant company under Rev., 1448, C. S., 1494. In *McCullen v. R. R.,* 146 N. C., 568, there were two causes of action but only one defendant, the Court holding that a suit could be prosecuted to recover both the penalty imposed and the special damages suffered by unreasonable delay in transporting the plaintiff's goods. The judgment is

Affirmed.

S. H. JORDAN, ADMINISTRATOR, v. GEORGE S. SIGMON ET AL.

(Filed 14 December, 1927.)

Wills—Bequests of Personal Property—Intent—Gifts—Descent and Distribution.

A bequest of personal property to the testator's wife for the term of her natural life, subject to her support, use and enjoyment, is to the extent not so used by her, distributable to her next of kin, at her death intestate, according to the testator's intent gathered from construing the instrument, there being no specific limitation over, or residuary clause in the will, and the expressed purposes of the bequest, "for her support, comfort and enjoyment" are consonant with an absolute gift.

APPEAL by George S. Sigmon, W. M. Sigmon, Mrs. M. E. Sigmon and Zeb. V. Sigmon, from *McElroy, J.,* at February Term, 1927, from CATAWBA.

Civil action brought by S. H. Jordan, administrator of the estate of Fannie Sigmon, deceased, and administrator, *c. t. a.,* of the estate of M. D. Sigmon, deceased, against the next of kin of both decedents (who are making opposing demands upon the plaintiff) to obtain a construction of the testator's will and for guidance in the discharge of his duties. *Tyson v. Tyson,* 100 N. C., 360, 6 S. E., 707.

M. D. Sigmon, late of Catawba County, died 8 January, 1925, leaving a last will and testament in which his wife, Fannie Sigmon, is named as executrix. The will was probated and the executrix duly qualified on 15 January, 1925. Thereafter, on 14 May of the same year, Fannie Sigmon died intestate. S. H. Jordan duly qualified as administrator of the estate of Fannie Sigmon on 25 May, 1925, and as administrator *c. t. a.* of the estate of M. D. Sigmon on 22 October, 1925, and now has in his possession funds and personal property belonging to said estates.

There being no children of this union and no issue surviving either, the next of kin of M. D. Sigmon, who are appellants herein, claim all the personal property owned by him at his death which was not used or consumed by his widow during the short interval of time she survived him. On the other hand, the next of kin of Fannie Sigmon claim that they are entitled to said property by virtue of the following provision in the will of M. D. Sigmon:

"*Second.* I give and bequeath to my beloved wife, Fannie Sigmon, all of my personal property of every kind, including money, bank deposits, notes and other solvent credits, for the term of her natural life, with the privilege to use for her support, comfort and enjoyment any part thereof and in any way that she may desire. I also give and devise to my said wife the tract of land on which I now reside, containing 94 acres, more or less, for the term of her natural life, and at her death said lands shall go to my heirs at law as the statute provides."

There is no controversy over the real estate. *Yelverton v. Yelverton,* 192 N. C., 614, 135 S. E., 632. The advice sought relates only to the personal property bequeathed under the above provision of the will, which contains no residuary clause, and there is no limitation over with respect to the personal property which amounted in value to about $1,200.

His Honor adjudged that the next of kin of the wife, Fannie Sigmon, were entitled to so much of the personal property passing under the will as had "lost its identity at the time of the death of Mrs. Sigmon" and that such personal property of the estate of M. D. Sigmon "as retained its identity at the death of Mrs. Sigmon" goes to the next of kin of M. D. Sigmon, deceased.

From this judgment the next of kin of M. D. Sigmon appeal, assigning error.

Self & Bagby for appellants.
Jesse Sigmon for appellees.

STACY, C. J. We think there is error in the judgment to the prejudice of the next of kin of Fannie Sigmon, and that the ruling of his Honor is too favorable to the next of kin of M. D. Sigmon, appellants herein.

It will be observed that there is no residuary clause in the will and no limitation over so far as the personal property is concerned. Under these conditions, a gift of personal property for life to the primary object of testator's bounty, with power to use "in any way that she may desire" is generally construed to be an absolute gift of the property. *Holt v. Holt,* 114 N. C., 242, 18 S. E., 967; *McMichael v. Hunt,* 83 N. C., 344; *Foust v. Ireland,* 46 N. C., 184. Especially is this true where the property, by reason of its amount and kind, may reasonably be expected to be consumed during the life of the donee, or within a short time after the death of the testator. *In re estate of Rogers,* 245 Pa., 206, 91 Atl., 351, L. R. A., 1917A, 168. And this is not affected by the use of the words "for her support, comfort and enjoyment," as they are but terms consonant with full ownership of the property.

In *Brownfield's Estate,* 8 Watts, 465, the testator gave his wife "one-third of my personal estate, during her life, after my just debts paid," without any disposition over: *Held,* the widow was entitled to receive one-third of the personal estate and to dispose of it as she pleased, there being no limitation over of the part given to her.

Again, in Diehl's Appeal, 36 Pa., 120, a testator gave to his wife a tract of land during her lifetime, "together with all my bonds and notes, to have and hold the same. Also, all my personal estate, whatsoever will be left after my decease, to have and to hold the same during her natural lifetime," without making any disposition over: *Held,* that the bonds and notes became the absolute property of the testator's widow.

The rule announced in these cases is not one of law, but one of construction, to be used in aid of the discovery of the testator's intention. *Tyson's Estate,* 191 Pa., 218, 43 Atl., 131.

The decisions in *McKinley v. Scott,* 49 N. C., 197, *Black v. Ray,* 18 N. C., 334, *James v. Masters,* 7 N. C., 110, and an *Anonymous Case,* 3 N. C., 161, while seemingly at variance with the Pennsylvania cases, just cited, are not in conflict with our present position, for in each of these cases the gift was for the life of the donee with no power of disposition.

Nor are the cases of which *Ernul v. Ernul,* 191 N. C., 347, 132 S. E., 2, and *Burwell v. Bank,* 186 N. C., 117, 118 S. E., 881, may be taken as illustrative, in conflict, for in each case going to make up this line of decisions, there is a limitation over or the bequest is for the life of the donee "and no more."

Let the cause be remanded with suggestion that the plaintiff proceed in a manner not inconsistent with this opinion. The costs of appeal will be taxed against the appellants.

Error and remanded.

TOWN OF LENOIR v. CAROLINA AND NORTHWESTERN RAILWAY COMPANY.

(Filed 14 December, 1927.)

Cities and Towns—Streets—Paving — Assessments — Adjoining Lands—Statutes.

Where a town, to widen its streets, agrees with a railroad company that it would condemn a strip of land and give it to the railroad company if it would remove its tracks thereto at its own expense, it may not, after this arrangement has been carried out, assess the lands of the railroad company for street paving, as the property, being a part of the street, is not "adjoining" within the provisions of our statute. C. S., 2708(3); C. S., ch. 56, Art. 9.

CIVIL ACTION, before *McElroy, J.*, at May Term, 1927, of CALDWELL.

The cause was submitted upon an agreed statement of facts. These facts are substantially as follows: Prior to 1885 there was a road or street in the municipality of Lenoir known as West Main Street. The tracks of the defendant railway in August, 1917, and prior thereto were in said street and had been laid therein and used by the defendant for more than twenty years. In August, 1917, the town of Lenoir acquired a strip of land by condemnation from various citizens on the north side of West Main Street upon an agreement with the railway company that the company would, at its own expense, move its tracks from the present location then in use to the new area so acquired by condemnation in order that the city might pave that part of the street theretofore occupied by the tracks of the railroad. The minutes of the meeting of the board of town commissioners, held on 20 August, 1917, show that upon motion duly adopted it was ordered "that the mayor appoint a jury for the purpose of condemning sufficient land on the north side of West and Harper Avenue for the purpose of widening said street according to survey." After the paving was finished the town levied an assessment against the defendant as an abutting owner for the sum of $1,521.30 upon a front footage of 627.1 feet. Of this front footage the defendant owned in fee 294.1 feet, and the amount of assessment, based upon such frontage is not in dispute. However, $854.08 of said assessment was levied upon a footage of 333 feet, which was assessed against the defendant as an abutting owner because of the location of its tracks. It further appears that the resolution adopted by the governing board, with respect to the improvement of said street, contained no requirement that the defendant should improve the land occupied by its tracks as specified by C. S., 2708, subsection 3. It further appears that the assessment was levied under Article 9, chapter 56, Consolidated Statutes.

Upon the agreed statement of facts the trial judge entered judgment decreeing that the plaintiff is not entitled to recover from the defendant the said sum of $854.08 assessed against the defendant for the footage of 333 feet.

From the judgment rendered the plaintiff appealed.

J. T. Pritchett and Self & Bagby for plaintiff.

John A. Marion, W. C. Newland and W. C. Feimster for defendant.

BROGDEN, J. It appears from the record in this cause that the defendant maintained its tracks in a public street known as West or West Main Street in the town of Lenoir. Prior to 20 August, 1917, the town of Lenoir was desirous of making permanent improvements to said street and as an incident thereto induced the defendant to move its tracks to the north of the then location thereof in said street. On 20 August, 1917, the board of town commissioners of said town of Lenoir passed a resolution directing "that the mayor appoint a jury for the purpose of condemning sufficient land on the north side of West and Harper Avenue for the purpose of widening said street according to survey." The condemnation was perfected and an additional strip of land acquired. Thereupon the defendant at its own expense shifted its tracks from the location then occupied to the north and upon this condemned area. The purpose of the condemnation, as set out in the resolution was for widening the street. As we interpret the record and plats the additional strip condemned resulted merely in widening the street and the incorporation of the condemned area as a part of the street as widened. So that when the defendant shifted its tracks it simply moved its tracks from one location in the street to another location in the same street in order that that part of the street formerly occupied by its tracks before removal could be paved. Thereupon the plaintiff town paved that part of the street formerly occupied by the tracks of defendant. When the paving was completed it assessed against the defendant as abutting owner the cost of 333 feet of paving, amounting to $854.08.

So far as the record discloses the defendant neither owns nor has an easement in any land outside of the street in which its tracks are laid. The sole question, therefore, is whether or not the defendant is an abutting owner by virtue of the fact that its tracks are laid in a public street. In *Anderson v. Albemarle,* 182 N. C., 434, this Court held that the words "Abutting on the improvement" mean "abutting on the street that is improved," and further, "by the term abutting property is meant that between which and the improvement there is no intervening land." Obviously this language means that abutting property cannot exist in the street itself but, in the nature of things, must be property outside of the street itself, touching or bordering upon the street or improvement. The case of *South Park Comrs. v. Chicago, Burlington and Quincy R. R. Co.,* 107 Ill., 105, is directly in point. In that case the assessment roll described the property of the defendant as "the right of way of occupancy, franchises, property and interests of Chicago, Burlington and Quincy Railroad Company, in Michigan Avenue, in the city of Chicago," etc. Upon an assessment made upon this easement upon the theory that this property "was contiguous property abutting upon such avenue" the Court said: "And as a street cannot, in the nature of things, abut on itself, and as mere intangible rights or privileges, for the same reason, are incapable of abutting on anything, it is clear the assessment was unauthorized." See, also, *Okla. R. R. Co. v. Severns Paving Co.,* 170 Pac., 216, 10 A. L. R., 157, in which many authorities are assembled.

The resolution authorizing the assessment contained no requirement that the defendant should improve the land occupied by its tracks as specified by C. S., 2708, subsec. 3. Holding, as we do, that the defendant was not an abutting owner upon the facts found by the trial court, the ruling of the trial judge was correct, and the judgment is affirmed.

The plaintiff excepted because the trial judge did not allow attorney's fees in accordance with chapter 42, Private Laws of 1925. This act permits the judge to allow a reasonable attorney fee for collecting a valid assessment. The act is not mandatory and the power to allow such fee is lodged in the discretion of the court.

Affirmed.

A. I. KAPLAN v. W. A. FERSON HAY AND GRAIN COMPANY, AND LIBERTY NATIONAL BANK, KANSAS CITY, MO.

(Filed 14 December, 1927.)

1. **Actions—Parties—Interveners.**

   An intervener made a party and contesting the action upon its merits thereby enters a general appearance.

2. **Same—Burden of Proof.**

   The burden of proof is on the intervener who has become a party and contests an action upon its merits, to sustain his allegations as such.

3. **Bills and Notes—Drafts—Banks and Banking—Agency for Collection —Principal and Agent—Due Course—Questions for Jury.**

   Where a bank accepts for deposit a draft drawn for goods sold and delivered by common carrier, reserving the right to charge the draft back to his depositor if not paid, it is an agency for collection and not a purchaser; and when the draft has been paid to the local bank of the drawee, who afterwards brings action against the consignor for damages for breach of contract of sale, upon conflicting evidence the question is for the jury.

4. **Evidence—Verdict—Directing Verdict — Bills and Notes — Drafts—Holder in Due Course—Prima Facie Case—Burden of Proof.**

Where an intervening bank of deposit claims the proceeds of a paid draft as holder in due course and not as an agency for collection for the drawer, the burden being on it to establish its rights, its request for a directed verdict upon the issue if the jury believe the evidence is properly denied, though it has made out a prima facie case by the endorsement, acceptance and possession of the draft.

APPEAL from *Devin, J.*, and a jury, at February Term, 1927, of WAKE. No error.

This was a civil action begun before a magistrate, on 26 August, 1926, by A. I. Kaplan against W. A. Ferson Hay and Grain Company, and Liberty National Bank, of Kansas City, Mo., to recover damages for a carload of hay shipped to the plaintiff, 19 June, 1926, from Kansas City, which plaintiff claims was defective in quality. The action was begun by attaching funds in the Commercial National Bank of Raleigh, which funds were derived from payment by this plaintiff of a draft for a subsequent shipment of hay from the same parties, 14 August, 1926. The Liberty National Bank gave bond and replevied the said funds so attached, as appears in the record.

The issues submitted to the jury and their answers thereto are as follows:

"1. What damages, if any, is plaintiff entitled to recover of the W. A. Ferson Hay and Grain Company? Answer: $150.

2. Do the funds attached herein belong to the Liberty National Bank of Kansas City? Answer: No."

S. Brown Shepherd, N. G. Fonville and J. E. Shepherd for plaintiff.
J. C. Little for defendants.

CLARKSON, J. It appears from the record that the defendant, Liberty National Bank, Kansas City, Mo., was made a defendant and gave bond and replevied the funds attached. The defendant Liberty National Bank contested the action on its merits and the appearance is general. *Motor Co. v. Reaves,* 184 N. C., 260; *Allen v. McMillan,* 191 N. C., 517. Although the bank is a defendant, yet it gave bond and claimed title to the fund it was practically an intervener and the burden of the issue was on the bank. *Sugg v. Engine Co.,* 193 N. C., p. 814.

There is no controversy on the first issue. The Liberty National Bank assigned error as to the charge of the court below, as follows: "You are instructed that the burden is on the defendant, Liberty National Bank, to show that it is the owner of the proceeds of the draft and if it has not so shown you by the greater weight of the evidence you should answer the second issue, No." In this charge we can find no error.

The record shows *that the plaintiff* introduced the deposition of J. T. Franey, vice-president of the Liberty National Bank, his testimony being in part: "On 14 August, 1926, W. A. Ferson Hay and Grain Company, of Kansas City, Missouri, drew a draft on A. I. Kaplan, of Raleigh, N. C., in the amount of $329.81, payable on arrival at Raleigh, N. C., of car 32121 C. R. I. & P., to the order of the Liberty National Bank, signed W. A. Ferson Hay and Grain Company, and drawn on A. I. Kaplan, Raleigh, N. C. The proceeds of this draft were credited to the account of W. A. Ferson Hay and Grain Company, this being placed to their credit on a checking account and the amount of the entire credit was checked out after the proceeds were credited to the account of W. A. Ferson Hay and Grain Company. . . . The draft was paid by Mr. Kaplan in the amount of $180.91 direct to the bank and the freight deducted as hàving been paid by Mr. Kaplan was $148.90. These two amounts made the face value of the draft. . . . The proceeds of this draft has not been paid to us, and we are at present owners of the same. . . . The net amount due to the Liberty National Bank on this Kaplan draft is $180.91."

The theory upon which this action was tried, the principle is laid down by *Allen, J.*, in *Worth v. Feed Co.*, 172 N. C., at p. 342: "The rule prevails with us, and it is supported by the weight of authority elsewhere, that if a bank discounts a paper and places the amount, less the discount, to the credit of the endorser, with the right to check on it, and reserves the right to charge back the amount if the paper is not paid, by express agreement or one implied from the course of dealing, and not by reason of liability on the endorsement, the bank is an agent for collection and not a purchaser." *Bank v. Rochamora,* 193 N. C., 1; *Sugg v. Engine Co.,* 193 N. C., at p. 819.

Assume that the bank was the holder of the draft and was suing plaintiff for the amount and plaintiff set up the defense as shown on the first issue, yet the burden of the issue was on the bank. The principle laid down and the charge of the court approved in *Bank v. Rochamora, supra,* is as follows: "If you find that the plaintiff bought the paper, that is, in due course, as I have defined that term, and did not take it as an agent for collection, then your answer to the first issue would be 'Yes'; if you do not so find, your answer to the first issue would be 'No.' If as purchaser in due course, if the plaintiff has satisfied you by the greater weight of the evidence of that, your answer to the first issue would be 'Yes,' if not, and you find that the bank accepted it as a collecting agent, your answer to the first issue would be 'No.'" At p. 7: "The burden of the issue was on plaintiff, and the court below so charges correctly. *Cotton Oil Co. v. R. R.,* 183 N. C., 95; *Hunt v. Eure,* 189 N. C., 482; *McDaniel v. R. R.,* 190 N. C., 474. To be sure, a prima facie case by the proof of the execution of the trade acceptance by defendants, its endorsement by Kaufman Brothers, and the possession of the trade acceptance by plaintiff bank, made out a prima facie case that plaintiff was the holder or purchaser in due course and not for collection. If plaintiff desired an instruction as to the effect of the prima facie evidence, it ought to have submitted prayer for specific instructions."

In apt time the defendant, Liberty National Bank, asked the court to instruct the jury "that if they believed the evidence they should answer the second issue Yes." We see no error in the refusal to give this charge. For the reasons given, there is in law

No error.

STATE v. SAM ANGEL.

(Filed 14 December, 1927.)

Certiorari—Appeal and Error—Courts—Discretion — Laches — Merit—Statutes—Rules of Court—Dismissal.

The granting of a *certiorari* by the Supreme Court to bring up for review a case on appeal, lies within the discretion of the court upon a showing made by the appellant that he himself had complied with all the requirements to get the case up and docketed in time to be heard under the rules of court, that the defense was meritorious, and that he had not been guilty of any laches therein, but that the delay was attributable to the proper officials of the court in which the case had been tried. C. S., 643, 644.

Motions by the defendant (1) for *certiorari* to have case brought up from Yancey County and heard on appeal, and (2) for a new trial for that the trial judge, Hon. Raymond G. Parker, died before settling the case on appeal, and counsel are not able to agree on a statement of the case. Motion by the State to docket and dismiss.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Charles Hutchins and R. W. Wilson for defendant.

STACY, C. J. The defendant was convicted at the March Term, 1927, of Yancey Superior Court, of receiving a number of turkeys, the property of one Martha King, knowing them to have been theretofore feloniously stolen or taken, in violation of C. S., 4250. From the judgment pronounced on the verdict, the defendant gave notice of appeal to the Supreme Court. By consent, and with the court's approval, the defendant was allowed 60 days within which to prepare and serve statement of case on appeal, and the solicitor was allowed 60 days thereafter to file exceptions or counter statement of case.

The defendant served his statement of case on appeal before the expiration of the time agreed upon, and the solicitor, through counsel employed to assist him, served exceptions thereto 25 June, 1927, well within the time allowed the State. There is a conflict between counsel for the defendant and counsel appearing with the solicitor as to whether the defendant's statement of case on appeal was returned with the exceptions filed by the State. Defendant says that it was not and for this reason he was unable to send the case and exceptions to the judge, with request that he fix a time and place for settling the case before him. C. S., 644. The trial judge died on or about 29 August, 1927.

It is provided by C. S., 643, that if the appellant's case is "not returned with objections, within the time prescribed (ten days), it shall be deemed approved," and when filed in the clerk's office it becomes part of the record. Such statement apparently has never been filed in the clerk's office. So, taking the defendant's own view of the matter, it would seem that he is not entitled to either motion. If his statement of the case on appeal were "deemed approved" under the statute, as he contends, because not returned with the objections filed by the State, then it follows that the failure to have the case docketed and ready for argument at the call of the Eighteenth District, the district from which the case comes, is due to his own laches and not to any fault of the court or its officers. *Womble v. Gin Co., ante,* 577.

But for another reason the defendant's application for *certiorari* must be denied. He shows no merit, or probable error committed on the trial. *Certiorari* is a discretionary writ, to be issued only for good or sufficient cause shown, and the party seeking it is required, not only to negative laches on his part in prosecuting the appeal, but also to show merit or that he has reasonable grounds for asking that the case be brought up and reviewed on appeal. Simply because a party has not appealed, or has lost his right of appeal, even through no fault of his own, is not sufficient to entitle him to a *certiorari.* "A party is entitled to a writ of *certiorari* when—and only when—the failure to perfect the appeal is due to some error or act of the court or its officers, and not any fault or neglect of the party or his agent." *Womble v. Gin Co., supra.*

Two things, therefore, should be made to appear on application for *certiorari:* First, diligence in prosecuting the appeal, except in cases where no appeal lies, when freedom from laches in applying for the writ should be shown; and, second, merit, or that probable error was committed on the hearing. *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562.

The motion of the Attorney-General to docket and dismiss at appellant's cost must be allowed. Defendant's motions for *certiorari* and for a new trial must be denied.

Certiorari disallowed.

New trial denied.

Appeal dismissed.

MAUD MEHAFFEY, ADMINISTRATRIX OF KENNETH MEHAFFEY, v. APPALACHIAN CONSTRUCTION COMPANY.

(Filed 21 December, 1927.)

1. **Negligence—Evidence—Proximate Cause—Instructions.**

   In an action brought by the personal representative for the wrongful death of the infant deceased alleged to have been caused by the defendant's breach of a contract made with his father, under conflicting evidence, it is required that the breach of the alleged contract was the proximate cause of the infant's death, and a charge that leaves out this element of the law is reversible error.

2. **Same—Contracts — Independent Contractor — Principal and Agent—Scope of Employment.**

   In an action to recover damages for the negligent killing by the defendant of plaintiff's intestate, alleged to have been caused by a breach of contract made for his safety, where the evidence is conflicting, and involves the questions of proximate cause, the fact of employment by an independent contractor and whether the negligence occurred after the deceased's duties for the day had terminated: *Held,* a charge that instructs affirmatively the principles of proximate cause as to the defendant's liability under these phases of the case is reversible error to the defendant's prejudice, unless the negative view of the law is also stated.

APPEAL by defendant from *Stack, J.,* at May Term, 1927, of HAYWOOD. New trial.

Action for personal injury resulting in death. The plaintiff alleged that the defendant was engaged in building a hard-surface road from Hazelwood to Balsam; that it had several workmen who lived in Hazelwood; that it was a part of the contract of employment that the defendant should carry them to and from the place where they were working; that Decatur Justice and Tom Freeman were employees charged with the duty of driving the defendant's trucks; that the Lee Transportation Company was engaged in hauling material for the defendant, and that Justice, Freeman and the Lee Company transported the employees to and from their work. It is alleged that the plaintiff's intestate, a minor 14 years of age, under a contract with his father, had been employed by the defendant to do certain work in Hazelwood, and in breach of the contract had afterwards been transferred to work on the road and required to ride on one of the defendant's trucks in going to and from his work; that on the occasion referred to in the complaint this truck, driven by Decatur Justice at an unlawful rate of speed, was following another truck negligently driven by Tom Freeman; that Freeman suddenly turned to the left to enter an intersecting road and compelled Justice to turn to the right in order to avoid a collision, and that the intestate was thrown to the ground and killed.

The defendant answered denying the material allegations, especially that either Justice or Freeman was its employee, and alleging that the Lee Transportation Company was an independent contractor. The action was brought against several parties, but finally prosecuted only against the defendant. The jury answered the issues as follows:

1. Did the defendant, Appalachian Construction Company, agree with Lawson Mehaffey, father of the intestate, Kenneth Mehaffey, to employ the said Kenneth Mehaffey to work at Hazelwood, and not to be worked on Highway No. 10 outside of Hazelwood, as alleged in the complaint? Answer: Yes.

2. Did the said defendant commit a breach of said agreement, as alleged in the complaint? Answer: Yes.

3. Was the breach of said agreement the proximate cause of the death of plaintiff's intestate, as alleged in the complaint? Answer: Yes.

4. What damages, if any, is the plaintiff entitled to recover? Answer: $7,000.

Judgment for plaintiff and appeal by defendant for error assigned.

Morgan & Ward and Alley & Alley for plaintiff.
A. Hall Johnston for defendant.

ADAMS, J. The motion to dismiss the action as in case of nonsuit was granted as to the Lee Transportation Company and denied as to the Appalachian Construction Company, against whom it was prosecuted to judgment. In its answer the defendant alleged that the Lee Transportation Company was an independent contractor, and it was said on the argument that because of this independent relation the motion for nonsuit was allowed. Decatur Justice, a witness for the plaintiff, testified that he and Tom Freeman were working for the Lee Transportation Company at the time of the injury; that the intestate fell from the witness's truck "after quitting time," when the Transportation Company had no control over the truck or the driver. Upon this theory it was not only important, but necessary, to ascertain whether the deceased rode on the truck merely at the invitation or by the license of the owner or driver, or whether carrying the deceased on a truck to and from his work was a part of the contract of employment. If the defendant was not obligated to provide transportation for the deceased a mere change in the place of work could hardly be considered the proximate cause of the injury suffered "after quitting time," when the relation of employer and employee had temporarily ceased. It is insisted by the appellant that these phases of the evidence were not clearly presented in the instructions relating to the third issue. The jury was first told in substance that a parent who hires a child of tender years has the right to limit the place where the child is to work; that it is the duty of an employer who assents to the limitation to observe it, and that his failure to live up to the agreement would be a violation of duty which would entitle the plaintiff to recover. If the defendant's contention is correct there may have been a breach of the contract under which the deceased was employed, and still the defendant may not have been liable in damages. This instruction, it is true, is followed by another to the effect that the breach of contract must have been a proximate cause of the injury; but we find no instruction which specifically sets forth the converse of this proposition—that is, that the defendant would not be liable if the intestate was injured while on the truck of one who at the time was in the service of an independent contractor, or who, if not in such service at the time, invited or permitted the intestate to ride on the truck as a matter of accommodation, with no agreement express or implied to render such service, and with no obligation on the part of the defendant to provide such transportation. Of course there is evidence that this duty devolved upon the defendant, but this evidence should have been submitted to the jury under instructions appropriate to the contentions of both parties. The controlling principle is thus stated in *Real Estate Co. v. Moser,* 175 N. C., 259: "The instruction given is correct as far as it goes, but the judge failed to state the defendant's contention and to instruct them that the defendant had a right to withdraw his proposition under certain conditions, and what those conditions were. Even without a specific instruction, it was incumbent upon the judge to do this, for when the judge assumes to charge and correctly charges the law upon one phase of the evidence the charge is incomplete unless it embraces the law as applicable to the respective contentions of each party, and such failure is reversible error." *Jarrett v.*

High Point Co., 144 N. C., 299; *Lea v. Utilities Co.,* 176 N. C., 514; *Butler v. Mfg. Co.,* 182 N. C., 547.

The following instruction also is subject to exception: "If the plaintiff has satisfied you by the greater weight of the evidence that the real, efficient cause, without which the injury and death would not have resulted, was the breach of this agreement on the part of the defendant, if you find by the greater weight of the evidence that he made the agreement claimed by the plaintiff, then your answer to the first three issues would be Yes, but if the plaintiff has not satisfied you by the greater weight of the evidence, then you would answer the first issue No." Under what circumstances were the second and third to be answered in the negative? The appellant is entitled to a

New trial.

FIRST NATIONAL BANK OF ROXBORO, INC., v. THE PEOPLES BANK.

(Filed 21 December, 1927.)

1. **Banks and Banking—Parties—Exchange—Actions—Statutes.**

   A bank may maintain its action against another bank to enforce by mandatory injunction its payment of the exchange charges drawn through the one on the other, allowed by the statute, 3 C. S., 220(z), and the fact that the plaintiff is a national and the defendant a State bank, does not vary this principle, and 3 C. S., 220(dd) does not apply.

2. **Same—"Remittance"—Words and Phrases.**

   The exchange or collection charges authorized by 3 C. S., 220(z), apply only to "remittances" covering checks, and where checks, etc., are sent to a bank in the same town with the bank on which they are drawn, for which either money or bank entries are required, such transactions do not fall within the meaning of the term "remittances" which will entitle the bank on which they are drawn to the exchange charges specified in the statute.

APPEAL by defendant from a judgment of *Midyette, J.,* permanently restraining the defendant from charging exchange on certain drafts and checks. From PERSON.

A jury trial was waived and the court found the following facts: "Both plaintiff and defendant are engaged in carrying on a banking business with their principal office in the town of Roxboro, N. C., and from time to time various banks and trust companies throughout this State and other states of the Union, remit through the regular course of mail, drafts and checks, drawn upon the defendant, to the plaintiff for collection and remittance; and the plaintiff presents all of said drafts and checks, during legal banking hours, at the counter of the defendant, the Peoples Bank, with the request that said drafts and checks be paid by the defendant at their face value, but the defendant positively declines and refuses to pay said drafts and checks either in cash or by exchange draft, unless it is permitted to withhold an exchange charge of one-eighth of one per cent, the defendant contending that it is the remitting bank, and, therefore, permitted and allowed to make an exchange charge of one-eighth of one per cent, under and by virtue of chapter 20, section 1, Public-Local Laws of 1921, 3 C. S., sec. 220(z), upon all out-of-town checks or drafts sent to the plaintiff for collection, and the plaintiff is either forced to return the drafts and checks as dishonored or allow the defendant to withhold an exchange charge. The banks and trust companies remitting drafts and checks to the plaintiff, drawn on the defendant, for collection, will not stand two charges, and the action of the defendant in collecting an exchange charge or returning drafts and checks as dishonored, compels the plaintiff to decline to receive said drafts and checks for collection and remittance, unless it renders its services without compensation."

Upon these facts it was adjudged that the defendant was not the remitting bank and was not entitled to an exchange charge upon checks and drafts presented for collection at its place of business, and that the defendant be permanently enjoined from making such charge under the circumstances described in the statement of facts and from returning such drafts and checks as dishonored for want of such exchange, provided the restraining order should not apply to checks sent to the plaintiff for collection by any Federal Reserve Bank. The defendant excepted and appealed. Affirmed.

C. A. Hall and L. M. Carlton for plaintiff.
William D. Merritt and F. O. Carver for defendant.

ADAMS, J. The plaintiff, a National bank, and the defendant, a State bank, are engaged in the business of banking in the town of Roxboro. The plaintiff alleges that in the course of its business it receives from other banks and trust companies checks drawn on the defendant, and in compliance with the request of the forwarding banks presents these checks to the defendant, requesting that it either pay them in cash or credit the plaintiff's account with their face value; that the defendant declines to pay the face value of any of the checks drawn on it and presented for payment at its place of business; that the plaintiff is forced to accept in payment less than the face value of the checks or return them as uncollected; and that the reason assigned by the defendant is its legal right to deduct an exchange charge of one-eighth of one per cent. The plaintiff alleges the result to be that it must return as uncollected all checks which it receives for collection on the defendant and that its legitimate business is to this extent impaired.

The appellant's first ground of defense is the plaintiff's alleged failure to state a cause of action, the position being that no one but the drawer of a check can maintain an action against the bank on which it is drawn for its refusal or failure to make payment. The position rests upon a misconception of the complaint. The action was not brought to recover damages, in tort or in contract, for refusing to honor the drawer's check, but to recover damages suffered by the plaintiff in the regular conduct of its business as a result of the defendant's failure to perform a duty enjoined by law. If the defendant owes to the plaintiff a duty which it refuses to observe, performance may be compelled by mandatory injunction. *Woolen Mills v. Land Co.,* 183 N. C., 511. True, it is provided that checks drawn on banks chartered by this State shall not be protested for the drawee's refusal to make payment merely because the holder or owner will not pay the authorized exchange, and that there shall be no right of action for refusal to pay such checks when the only basis of the action is refusal to pay the authorized exchange (3 C. S., 220(dd); but the "exchange or collection charges herein authorized" are those referred to in section 220(z). It is apparent, then, that the decisive question is whether the defendant has the legal right to make an exchange charge, and this involves the further question whether upon the facts found by the court the defendant is a remitting bank.

Section 220(z) is as follows: "For the purpose of providing for the solvency, protection and safety of the banking institutions and trust companies chartered by this State, and having their principal offices in this State, it shall be lawful for all banks and trust companies in this State to charge a fee, not in excess of one-eighth of one per cent, on remittances covering checks, the minimum fee on any remittance therefor to be ten cents."

This statute and others were enacted in consequence of an effort of the Federal Reserve Board to introduce universal par clearance and collection of checks through Federal Reserve Banks. We have no occasion for going into this history; it is clearly set forth in *Farmers and Merchants Bank v. Federal Reserve Bank,* 262 U. S., 649, 67 Law Ed., 1157. We are now concerned only with the statute just cited. Its purpose is to provide for the solvency, protection and safety of the banking institutions and trust companies chartered by this State. It authorizes them to charge a fee, not in excess of one-eighth of one per cent, "on remittances covering checks"; and the direct question is whether payment in cash or the entry on the defendant's books of a credit for the benefit of the plaintiff is a remittance. For according to the complaint this is what the plaintiff requested when the checks were presented—payment in cash or credit on its account at the face value of the checks. Neither request called for a remittance. The word "remit" has several definitions, but the sense in which it is used in the statute is that usually given it in commercial transactions: "To transmit or send, especially to a distance, as money in payment of a demand, account, draft," etc.; "to transmit or send, as money, bills, or other things in payment for goods received"; "to send or transmit, as to remit money"; "to transmit, forward, send." Webster's New International Dictionary; Century Dictionary; 3 Bouvier's Law Dictionary (3 Revision), 2871; Black's Law Dictionary; *Hollowell v. Ins. Co.,* 126 N. C., 398; 34 Cyc., 1207; 24 A. & E. (2 ed.), 461. See *Hayden v. Chemical Nat. Bank,* 84 Fed., 874. The transaction between the plaintiff and the defendant did not amount to a remittance or make the defendant a remitting bank so as to entitle it to charge the fee authorized in section 220(z). The fact that the plaintiff was not chartered by the State is immaterial.

The appellant says that it will have no protection if the plaintiff is permitted to accumulate checks drawn on it and then demand payment in cash at their face value; but it is to be assumed that the defendant will have an equal opportunity to accumulate checks drawn on the plaintiff. At any rate, such considerations cannot control in our interpretation of the statute. The judgment is

Affirmed.

C. B. LANE v. GRAHAM COUNTY ET AL.

(Filed 21 December, 1927.)

1. **Pleadings—Demurrer—Admissions.**

A demurrer to the complaint admits only the facts properly alleged, and not the legal conclusions inferable therefrom.

2. **Taxation—Counties — Sheriffs—Actions—Publication of Sale—Newspapers—Parties.**

Publication of sale of real property for unpaid taxes as directed by the statutes on the subject, is the official duty of the sheriff, and to be made on the day directed by the county commissioners; and the newspaper in which these notices are published has a right of action against the sheriff contracting for their publication, and not against the board of county commissioners, which only makes an allowance to the sheriff to cover such charges. C. S., 8014, 8015, 8009.

APPEAL by defendant from *Harding, J.,* at Fall Term, 1927, of GRAHAM. Reversed.

Action to recover of defendants for the publication in a newspaper of notices of the sales of land in Graham County for taxes.

From judgment overruling its demurrer to plaintiff's complaint, defendant, Graham County, appealed to the Supreme Court.

Moody & Moody for plaintiff.
R. L. Phillips for defendant.

CONNOR, J. This action was heard in the Superior Court upon appellant's demurrer to plaintiff's complaint. The ground of such demurrer is that the complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant, Graham County.

The material allegations of the complaint are as follows:

"3. That at a meeting of the board of commissioners of defendant, Graham County, held on 2 May, 1927, the defendant, Graham County, through its board of commissioners, passed an order empowering and directing the defendant, Riley Orr, tax collector as aforesaid, to sell all land for taxes, where the taxes for the current year had not been paid, and said order further empowered and directed the defendant, Riley Orr, tax collector as aforesaid, to advertise said lands for sale for four consecutive weeks, beginning 10 May, 1927, as required by law."

"4. That pursuant to the order aforesaid, passed by the board of commissioners of the defendant, Graham County, the defendant, Riley Orr, tax collector as aforesaid, requested the plaintiff to publish the notices of sales of lands for taxes, which said notices were required to be published once a week for four consecutive weeks in plaintiff's newspaper, *Graham County News;* that plaintiff, acting upon the instructions and request of the defendant, Riley Orr, tax collector and agent of the defendant, Graham County, proceeded to publish in manner and form as presented to him, the notices of sales of lands for uncollected taxes, and said notices were duly published in plaintiff's newspaper, *Graham County News,* in the issues dated 10 May, 17 May, 24 May and 31 May, 1927."

Upon his further allegation that the reasonable charge for the publication of said notices was $525.25, and that defendant, Graham County, has refused to pay his claim for such publication, plaintiff demands judgment that he recover of defendants, including Graham County, the sum of $525.25, with interest and costs.

The question of law presented by defendant's demurrer is, whether, upon facts as alleged in the complaint, a county is liable to a publisher of a newspaper, who, at the request of a sheriff or tax collector, has published in his newspaper notices of sales of lands for taxes, required by statute, for his reasonable charges for such publication. The answer to this question manifestly requires a consideration of the provisions of the statutes relative to the sale of lands for taxes.

The allegation in the complaint that the tax collector was acting as agent of the board of commissioners, and in accordance with its express direction, when he requested plaintiff to publish the notices in his newspaper, involves a matter of law, and is not an allegation of fact which is admitted by the demurrer. The principle is stated by *Hoke, J.,* in *Board of Health v. Comrs.,* 173 N. C., 250, as follows: "It is fully recognized that for the purpose of presenting the legal question involved, a demurrer is construed as admitting relevant facts well pleaded, and, ordinarily, relevant inferences of fact necessarily deducible therefrom, but the principle is not extended to admitting conclusions or inferences of law, nor to admissions of fact when contrary to those of which the court is required to take judicial notice, and more especially when such opposing facts and conditions are declared and established by a valid statute applicable to and controlling the subject."

The duties of both the board of commissioners and of the sheriff or tax collector, with respect to the sale of land for taxes, are prescribed by statute; the sheriff or tax collector does not perform his duties in that respect as agent of the board of commissioners, nor has the board of commissioners any power or authority to order or direct the sheriff or tax collector, with respect to the performance of his duties, except as prescribed by statute. The demurrer does not admit as a fact that the tax collector in the instant case was agent of the board of commissioners, or that he was acting as such agent, when he requested plaintiff to publish the notices of land sales to be made by him, as required by statute.

It is provided by section 4 of chapter 213, Public Laws 1927, that each sheriff or tax-collecting officer "shall on the first Monday in May report in full the uncollected taxes for the current tax year, and the county commissioners shall thereupon order sale of all land for taxes, where the taxes have not been paid, to be made on the first Monday in June, and shall also make up a list of taxes due of taxpayers who list no land for taxes. The sheriff or other tax-collecting officer shall thereupon cause advertisement to be made for four successive weeks, as now provided by law for such advertisements, of lands to be sold for taxes, and shall make effort to collect all taxes due by taxpayers who list no land for taxes. Sale of land for taxes shall be made upon the day ordered by the board, provided that the sale may be continued from day to day until completed."

It is provided by C. S., 8014, that "before any real estate shall be sold for taxes the sheriff shall give public notice of the time, place and cause of such sale by advertisement at the courthouse door and in some newspaper published in the county, if any there be, for four successive weeks immediately preceding the day of sale."

It is provided by C. S., 8015, that "all the advertised real estate of each delinquent shall be sold at the same time as one body, and no bid therefor shall be received unless sufficient in amount to discharge all the taxes due by the delinquent, together with all costs and expenses of the sale. If no such bid be received, the county, city or town, as the case may be, shall be deemed the purchaser, and the sheriff shall so record it on his sales book."

The fees to be paid to the sheriff who has sold land for taxes are prescribed by C. S., 8009. It is further provided therein that "the county commissioners shall allow him in settlement such other sums as he has actually expended which were necessary for the due execution of his duties under this chapter."

As it is the duty of the sheriff or tax-collecting officer to give the public notice by advertisement, required by statute, such sums as may be actually and necessarily expended by him in the performance of this duty, should be added to the amount of taxes and costs; the aggregate of these amounts is the minimum bid which he is allowed by law to receive. If the purchaser at the sale is not the county, city or town, the sheriff or tax-collecting officer may reimburse himself for all sums expended for publication of the notice of sale, out of the amount received by him from the purchaser for the land sold; if the county, city or town becomes the purchaser, under the provisions of the statute, such sums should be allowed to the sheriff or officer in his settlement with the commissioners and paid by the county, city or town which has become the purchaser, under the statute, of the land sold, pursuant to the notice. In no event, however, is the county, city or town liable to the publisher of the newspaper in which the notices are published. His contractual relations are with the sheriff or tax collector. The county is liable only to the sheriff or tax collector, and then only when it has become the purchaser of the land in accordance with the provisions of the statute.

There was error in overruling the demurrer. The demurrer of the defendant, Graham County, should be sustained. The right of plaintiff to maintain the action against Riley Orr, individually, and as tax collector of Graham County, is, of course, not brought in question by the demurrer filed by Graham County. The judgment is

Reversed.

THE RALEIGH REAL ESTATE AND TRUST COMPANY v. WISTAR R. PADGETT AND WIFE, HATTIE C. PADGETT.

(Filed 21 December, 1927.)

Mortgages—Trusts—Substituted Trustee—Statutes—Sales — Foreclosure —Deeds and Conveyances—Title.

Where the terms as to foreclosure in a deed of trust on lands to secure borrowed money have been complied with as to the substitution of the trustee, the method therein expressed for this purpose is contractual and does not arise under the provisions of C. S., 2583, requiring certain proceedings to be taken in the courts; and a deed made by a substituted trustee in accordance with the agreement passes the title to the purchaser at the foreclosure sale.

APPEAL by plaintiff from *Moore, Special Judge,* at November Term, 1927, of WAKE. Reversed.

Controversy without action.

The case agreed shows that as the holder of the bonds secured by the deed of trust in which John H. Boushall was named trustee, The Raleigh Savings Bank and Trust Company appointed Thomas H. Calvert as successor trustee, who proceeded to foreclose the deed of trust, at which foreclosure the plaintiff, The Raleigh Real Estate and Trust Company became the purchaser of the property and Thomas H. Calvert, successor trustee, made it a deed. John H. Boushall was a resident of the State at the time the deed of trust was made, but nearly two years before the foreclosure he abandoned his residence in North Carolina and took up his permanent residence in the State of Florida. John H. Boushall signed the following paper-writing, which was duly acknowledged and registered:

"North Carolina—Wake County.

"To The Raleigh Savings Bank and Trust Company.

"Take Notice: That I, the undersigned, John H. Boushall, duly appointed trustee in a deed of trust executed by Lawton B. Wilson and wife, Elmo D. Wilson, to John H. Boushall, trustee for The Raleigh Savings Bank and Trust Company, which deed of trust is duly recorded in Book 459, at page 499, in the office of the register of deeds for Wake County, do hereby resign of and from all and every the rights and duties imposed on me as such trustee in the aforesaid instrument, and do hereby request that you appoint a successor trustee to assume and discharge the duties imposed upon the trustee in the said instrument.

"This 16 June, 1927. JOHN H. BOUSHALL."

The Raleigh Savings Bank and Trust Company signed the following paper-writing, which was duly acknowledged and registered:

"North Carolina—Wake County.

"John H. Boushall, duly appointed trustee in a deed of trust executed by Lawton B. Wilson and wife, Elmo D. Wilson, to John H. Boushall, trustee for The Raleigh Savings Bank and Trust Company, which deed of trust is duly recorded in Book 459, page 499, in the office of the register of deeds for Wake County, having resigned as such trustee, the undersigned, The Raleigh Savings Bank and Trust Company, being the holder of the bonds secured by the said deed of trust and under and by virtue of the authority conferred upon it by the said deed of trust does hereby nominate and appoint Thomas H. Calvert as his successor trustee, who is charged with all the powers therein contained.

"In witness whereof the said The Raleigh Savings Bank and Trust Company has caused this instrument to be signed in its corporate name by its vice-president and attested by its secretary, and its corporate seal to be hereto affixed, this 17 June, 1927.

"THE RALEIGH SAVINGS BANK AND TRUST COMPANY.
"By G. H. ANDREWS, *Vice-President.*
"Attest: W. REID MARTIN, *Secretary.*"

The principal question presented by the case agreed is as to the validity of the appointment of the successor trustee, and the sale made by the successor trustee to plaintiff. The stipulation in the deed of trust provides:

"If the party of the second part shall die, *or otherwise become disqualified,* then the party of the third part, or the holder of the bonds hereby secured, shall have the right, by a paper-writing duly executed and registered, to nominate his successor, who shall be charged with all the powers contained herein, and the expense of the preparation of such paper-writing and registration thereof shall be paid by the parties of the first part."

Thomas H. Calvert for plaintiff.
N. G. Fonville for defendants.

CLARKSON, J. C. S., 2583, in part, is as follows: "When the sole or last surviving trustee named in a will or deed of trust dies, removes from the county where the will was probated or deed executed, and from the State, or in any way becomes incompetent to execute the said trust, or is a nonresident of this State, the clerk of the Superior Court of the county wherein the will was probated or deed of trust was executed is authorized and empowered, in proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the trust according to its true intent and meaning, and as fully as if originally appointed," etc.

Defendants contend that the deed made by Thomas H. Calvert, successor trustee, was void, for the reason that the statute was not complied with; that the paper-writing signed by John H. Boushall was not sufficient to allow a substitution; that should the court find that the provision of said deed of trust is sufficient to allow a substitution of trustee in the manner in which it was made, the defendants contend that the fact that John H. Boushall was living in the State of Florida was not a sufficient disqualification to permit a substitution of the trustee and that his resignation did not cure this defect.

We cannot so hold. The statute is not applicable. The parties have contracted and we are construing the agreement entered into by them. In the purview of the agreement, we are of the opinion, in the sense used, as shown by the record, that the resignation was a disqualification. See *Thompson v. Wynne,* 127 Miss., p. 773. The judgment of the court below is

Reversed.

EDSON W. THOMAS v. CAROLINA WOOD PRODUCTS COMPANY.

(Filed 21 December, 1927.)

1. Appeal and Error—Objections and Exceptions — Broadside Exceptions —Review.

An exception to a judgment modifying and confirming the unmodified part of the report of the referee by the trial judge, without particularizing the error sought to be reviewed on appeal to the Supreme Court, is a broadside exception and will not be reviewed.

2. Appeal and Error—Referee — Modification—Courts — Evidence—Review.

The affirmation of the referee's findings of fact by the trial judge, or a modification thereof by him, is not reviewable on appeal when supported by legal evidence.

3. Same—Questions of Law.

Where in an action by an agent to recover commissions on goods sold under contract within a certain territory, and referred, the referee has found that the commissions were due on all goods sold within the territory, and upon supporting evidence the trial judge has found that this arrangement continued to a certain date and was then modified by the parties so that the agent thereafter was only entitled to his commissions on orders sent in by him: *Held,* the judgment based on such modification is upon a finding of fact, and is not reviewable as a conclusion of law.

APPEAL by defendant from *Shaw, J.,* at June Term, 1927, of BUNCOMBE. Affirmed.

The plaintiff brought suit on a contract alleged to have been made by him and the defendant to recover commissions in the sum of $13,931.51 for the sale of furniture and other products of the defendant in designated territory. The defendant filed an answer and upon issues joined the cause was referred. The referee made a report and both parties filed exceptions. Judge Shaw reviewed the report and rendered the judgment appearing of record. The defendant excepted and appealed on error assigned.

Osborne, Osborne & Link and Merrimon, Adams & Adams for plaintiff.

Merrick, Barnard & Heazel for defendant.

ADAMS, J. Though the record contains 550 typewritten pages, the defendant's assignments of error reduce the merits of the controversy to a narrow compass. All exceptions to the report of the referee were overruled except as sustained or modified by the judgment. The referee found from the evidence that for more than a year prior to 29 April, 1918, the plaintiff had worked in certain territory as defendant's salesman under a contract whereby he was to receive a commission of seven per cent on all shipments made by the defendant to customers in said territory, and that the contract had never been changed except as to territory, and had remained in effect until 1 January, 1920. With respect to this finding Judge Shaw modified the report as follows:

"That up to 25 November, 1919, plaintiff was working under a contract with defendant, by and under which plaintiff was entitled to receive seven per cent commissions on the sale price of all goods shipped by defendant into plaintiff's territory theretofore allotted to him, on orders received prior to 25 November, 1919, irrespective of the source of said orders or when said orders were shipped, and that, after 25 November, 1919, the contract was so modified that the plaintiff for any future services was to receive seven per cent commission on the selling price only, on all goods shipped into said territory on orders which plaintiff personally produced; but the court further finds that notwithstanding the above modification of said contract plaintiff was entitled to commissions upon all orders received from his territory, whether said shipments were made before or after the first day of January, 1920."

In addition he found the following facts:

"That shipments were made by defendant to parties within said territory allotted plaintiff upon orders taken prior to 25 November, 1919, amounting to $205,378.75; and shipments made after 25 November, 1919, upon orders personally produced by plaintiff amounting to $6,209.00; after 25 November, 1919, and before 1 January, 1920, and the total of said shipments upon which plaintiff is entitled to seven per cent commissions is $211,587.75.

"That the amount earned by plaintiff for commissions on said shipments is $14,811.14.

"That defendant has paid to plaintiff on account of said commission so earned the sum of $3,555.19, leaving a balance due and owing by said defendant to said plaintiff of the sum of $11,255.95."

It was thereupon adjudged that the plaintiff recover of the defendant $11,255.95 with interest at six per cent from 1 January, 1920.

Following the judgment is this entry: "The defendant excepts to the foregoing judgment and to the findings of fact of the court, and gives notice of appeal to the Supreme Court."

Pretermitting the plaintiff's objection to the sufficiency of the defendant's exceptions, we pass to a consideration of the assignments of error. The first is a "broadside" assignment which fails to suggest wherein the "court erred in approving and confirming the report of the referee except as modified." This assignment is "too general to fulfill the requirements of the rules of this Court." *Sturtevant v. Cotton Mills,* 171 N. C., 119. The next two assignments relate to alleged error in overruling the defendant's first and second exceptions to the referee's report; but upon an inspection of the record we have failed to find error in either of these respects. The fourth assignment is addressed to Judge Shaw's modification of the referee's finding of certain facts. There is evidence in support of the modified finding and the facts as found are not reviewable in this Court. It is contended, however, that the modification embraces a question of law as well as a finding of fact. We do not so interpret the judgment. Whether the original contract was canceled on 25 November, 1919, as alleged, or whether as the court found it was only modified as to future services, the fact remains that shipments were made after 25 November upon orders personally produced by the plaintiff and accepted and filled by the defendant. The plaintiff was entitled to commissions on these orders. The modification is primarily a finding of fact as to the agreement of the parties and not a change of the facts by judicial construction. Other assignments point out alleged error in findings of fact; but when facts are found by the court below and there is evidence to support them, this Court is bound by the facts, and its right of review is confined to errors of law. *Rhyne v. Love,* 98 N. C., 486; *Thornton v. McNeely,* 144 N. C., 622; *Brown v. R. R.,* 154 N. C., 300; *Taylor v. Hayes,* 172 N. C., 663; *Williams v. Kearney,* 177 N. C., 531. Judgment

Affirmed.

JOHN M. COBLE v. J. T. DICK.

(Filed 21 December, 1927.)

Deeds and Conveyances—Warranty—Encumbrances—Municipal Corporations—Street Improvements—Liens—Statutes—Mortgages—Actions.

Assessments made upon the property of the owner for street and sidewalk improvements by a town, and in all respects under the authority conferred on the municipality by statute, extending in partial payments over a designated period of time, are to be regarded in the nature of a statutory mortgage when due and payable, and constitute liens on the property within the warranty clause against encumbrances contained in a deed, and recoverable in the grantee's action against the grantor to the extent he has been required to pay them. C. S., 2713, 2716, 2717.

APPEAL by defendant from *Barnhill, J.*, at September Term, 1927, of ALAMANCE. Affirmed.

The following is agreed statement of facts:

"1. That the plaintiff, John M. Coble, purchased from the defendant, J. T. Dick, a building lot in the town of Mebane, N. C., on 31 March, 1924, and the defendant executed to the said John M. Coble deed for a consideration, said deed containing full covenants and warranties against all encumbrances whatsoever.

"2. That prior to the execution of the aforesaid deed street and sidewalk assessments had been legally and regularly levied against the property conveyed in said deed; that annual installments for a ten-year period had been authorized by the city of Mebane; that said installments were $23.46 each, plus interest computed annually.

"3. That the installment of 15 January, 1924, was paid by the defendant, and since that time the plaintiff has paid the sum of $67.34, and this action is brought for the recovery of the sum of $67.34, the amount plaintiff has already paid on said assessment; that plaintiff's cause of action is based upon the warranties contained in said deed against all encumbrances.

"4. That the assessment-roll went into effect on 15 July, 1922, and that all annual installments accruing prior to the date of said conveyance had been paid by the defendant, J. T. Dick.

"5. That the assessment was made by the town of Mebane, N. C., under the act of the Legislature of North Carolina, known as local improvement statutes and under municipal finance acts as set forth in chapter 56 of the Consolidated Statutes of North Carolina, and was regularly and properly made.

"6. It is agreed that the entire question is whether such assessment is an encumbrance as contemplated or included in the warranty."

The judgment, in part, is as follows: "The court being of the opinion that the street assessment lien set out in said agreed statement of facts constitutes an encumbrance within the meaning of the warranty clause in said deed from the defendant to the plaintiff: it is ordered, considered and adjudged that the plaintiff recover of the defendant, J. T. Dick, the sum of $67.34, together with interest," etc.

John J. Henderson for plaintiff.
Thomas C. Carter for defendant.

CLARKSON, J. C. S., 2713, in part, is as follows: "Whenever the governing body shall confirm an assessment for a local improvement, the clerk of the municipality shall enter on the minutes of the governing body the date, hour and minute of such confirmation, *and from the time of such confirmation the assessments embraced in the assessment roll shall be a lien on the real property against which the same are assessed, superior to all other liens and encumbrances."* (Italics ours.)

C. S., 2716, provides that payment of assessments can be in cash or by installments.

C. S., 2717, provides how the payment can be enforced.

In *Kinston v. R. R.,* 183 N. C., p. 14, it is termed a "statutory mortgage." *Bank v. Watson,* 187 N. C., p. 107.

In *Hahn v. Fletcher,* 189 N. C., at p. 732, it is said: "From the facts found the covenant in plaintiff's deed was 'against encumbrances.' When defendant delivered the deed to plaintiff, this covenant was broken with the street assessment—a lien or a statutory mortgage on the land. Plaintiff could have at once sued for the breach." In *Farrow v. Ins. Co.,* 192 N. C., p. 148, this encumbrance was held not such as to defeat insurance policy under sole ownership clause. It will be noted in the *Hahn case, supra,* the action was tried out on the theory that the justice of the peace court had no jurisdiction. It was so held—technical but legal. See *Comrs. v. Sparks,* 179 N. C., p. 581.

In the present action the agreed statement of fact sets forth, "It is agreed that the entire question is whether such assessment is an encumbrance as contemplated or included in the warranty." We are not disposed *ex mero motu* to dismiss the action for want of jurisdiction.

Upon the facts agreed upon in this case the street assessment lien is an encumbrance within the meaning of the warranty clause in the deed from defendant to plaintiff. The judgment of the court below is

Affirmed.

C. FELIX HARVEY v. KINSTON KNITTING COMPANY ET AL.

(Filed 21 December, 1927.)

Judicial Sales—Sales—Mortgages—Contracts—Corporations — Insolvency —Equity—Evidence—Findings—Appeal and Error.

Where in proceedings in dissolution of an insolvent corporation it appears that the property is subject to mortgage, and from the facts found by agreement upon legal evidence by the trial judge, it was for the best interest of all concerned that it be sold at the judicial sale subject to the mortgage with the consent of the mortgagee, which had been given: *Held*, under a sale so made a deed made to the purchaser in due pursuance of the law, will be legal and convey to him the title to the property of the insolvent corporation, in the absence of evidence that it would be inequitable to the complaining parties who are interested therein.

APPEAL by several of the defendants from *Cranmer, J.*, at August Term, 1927, of LENOIR.

Civil action to dissolve an insolvent corporation and to wind up its affairs by the aid of receivers, who duly qualified, sold the property of the corporation under order of court and submitted their report for confirmation.

The plaintiff alleges in his complaint:

"That further, if the property could be sold (as plaintiff believes it can be sold) subject to the lien of the Virginia Trust Company, so that any purchaser could assume such indebtedness under the terms of same, the property, as plaintiff is advised, informed and believes, would bring more, and such purchaser would be relieved of raising so large an amount in cash or otherwise as directed by the court."

Later, the Virginia Trust Company, by petition duly filed in the cause, comes in and sets up:

"That in accordance with the seventh paragraph of the complaint in this receivership action, the said Virginia Trust Company, in making itself a party, does hereby agree and authorize the court, wherein this cause is pending, to enter order accordingly, that a sale of the properties of the Kinston Knitting Company may be had subject to the said Virginia Trust Company's lien herein set forth, and that any purchaser under and by virtue of such sale may have the privilege of assuming the said payment of the Virginia Trust Company's indebtedness herein set up under the terms thereof, but that such sale shall in no wise affect the validity of said indebtedness in said lien, and that the said lien shall be as binding under the purchase of the properties as outlined herein as if the same remained in the hands of the original debtor, the purpose hereof being to enable any purchaser to make bid, and as a part of said bid to assume the indebtedness set out in this petition, which indebtedness shall remain protected under the said lien herein set forth."

The order of sale provides:

"(1) The said real and personal property shall first be offered for sale freed and cleared from all liens, including the liens held by the Virginia Trust Company, trustee.

"(2) Immediately after the sale, freed from liens, the same said property shall be offered subject to the lien held by the Virginia Trust Company, trustee aforesaid, so that the purchaser thereof shall take the said property burdened with and subject to the said lien aforementioned to the said Virginia Trust Company, trustee. The said receivers shall report to the court both bids hereunder, together with their recommendation as to the bidder or best bid."

The receivers reported that C. Felix Harvey was the last and highest bidder at the sale of the properties of the defendant corporation, and recommended that his bid or bids, made subject to the lien of the Virginia Trust Company, trustee, be accepted and approved.

The defendants, H. E. Moseley, D. L. Oettinger, C. F. Dunn, Myrtie A. Tull, executrix, Lunsford Abbott, administrator, and Lillie T. Oettinger, executrix, duly filed exceptions to the order of sale and objected to the confirmation thereof, alleging in substance:

1. That the property, located at Beaufort, N. C., was sold subject to the lien of the Virginia Trust Company, trustee, of approximately $91,000, and later the property located at Kinston, N. C., was sold subject to this same lien, thus making it impossible for bidders on the Kinston property to bid intelligently or to know the actual amount of their bids.

2. That a sale made in this manner is patently unfair, unjust and inequitable to the unsecured creditors, stockholders and parties interested in the corporation, for that its tendency was to suppress bidding at the sale of the Kinston property, and that said property brought far less than its real value at said sale.

The exceptions of the appealing defendants were overruled by the trial court, after finding that the bid of C. Felix Harvey was a fair and reasonable one, for the properties bid in by him in accordance with the terms of sale; that the sale was fair and open, and that there was nothing before the court to show that a resale would result in a higher bid or bids.

Whereupon it was ordered "that upon compliance by the said purchaser, C. Felix Harvey, with his bids in accordance with the terms of the sale, as fully appear in the order of sale and in the report of sale by the receivers, that the said receivers be, and they are hereby, authorized, empowered and directed to execute and deliver unto the said purchaser, C. Felix Harvey, a deed in fee simple, subject to the lien held by the Virginia Trust Company, trustee, and referred to in the record, to all the properties covered by his bids, and actually to deliver to him the personal property so purchased, in all respects in accordance with the said order of sale, the report of sale, and this decree."

From this order of confirmation the above-named defendants, first having preserved their objections and exceptions, appeal, assigning errors.

Connor & Hill for plaintiff.
Rouse & Rouse, J. W. Bailey and L. I. Moore for defendants.
Cowper, Whitaker & Allen for receivers.

STACY, C. J. The exceptions filed by the appealing defendants and their objections to a confirmation of the sale made by the receivers evidently presented to the trial court a number of perplexing questions, but in view of his findings and rulings, under settled principles of law, there is nothing left for us to do but affirm the judgment. *Perry v. Perry,* 179 N. C., 445, 102 S. E., 772; *Clement v. Ireland,* 138 N. C., 136, 50 S. E., 570; 35 C. J., 50.

Of course equity will not omit to see that the rights of the endorsers on the notes held by the Virginia Trust Company, trustee, and others interested in the corporation, are properly protected, but as they are not now before us, we refrain from any discussion of them.

Affirmed.

J. C. MANEY v. ANDREWS TANNING EXTRACT COMPANY.

(Filed 21 December, 1927.)

1. **Fraud—Statute of Frauds—Parol Contracts—Third Parties—Contracts —Deeds and Conveyances.**

   A verbal contract between plaintiff and defendant that the latter was to cut wood at an agreed price per cord, does not come within the statute of frauds, and is not affected by the fact that the defendant had not the legal title at the time of the cutting.

2. **Contracts—Damages—Evidence—Questions for Jury.**

   In this action to recover the plaintiff's profits on cutting cord wood at a certain price per cord within a limited time, evidence of the plaintiff's preparations and the prosecution of his work, and the number of trees upon the *locus in quo,* was sufficient to sustain the verdict and judgment thereon in his favor.

CIVIL ACTION, before *Shaw, J.*, at February Term, 1927, of BUNCOMBE.

The plaintiff offered evidence tending to show that he made a verbal contract with the defendant about April, 1925, to sell and deliver certain acid wood on a certain boundary of land in Graham County at a stipulated price per cord. After making said contract the plaintiff purchased by verbal contract the timber upon the boundary from Charles F. Byrd, paying Byrd the sum of $1,250 therefor. Plaintiff received no deed for said timber from Byrd, and under the agreement with Byrd the timber was to be cut and removed by the 8th of December. After the consummation of the agreement plaintiff began to cut and deliver the wood to the defendant until about June or July, when the defendant notified the plaintiff that he would not take any more wood except at $5 per cord by reason of the fact that the price of wood had declined. There was evidence tending to show that there was from fourteen hundred to three thousand cords of wood upon the boundary, and the plaintiff had delivered to the defendant approximately two hundred cords. The evidence tended to show that there was a profit of one dollar per cord in all the wood upon the boundary. The defendant denied that he had made contract with the plaintiff for any particular time or for any specific amount of wood, but that he would pay the price specified for such wood as plaintiff delivered until further notice.

Issues were submitted to the jury and answered in favor of the plaintiff. From judgment upon the verdict the defendant appealed.

Roberts, Young & Lane for plaintiff.
Dillard & Hill and A. Hall Johnston for defendant.

BROGDEN, J. There are two distinct groups of exceptions relied upon by the defendant. The first group of exceptions grows out of the fact that the plaintiff had no deed for the standing timber from which the wood was to be cut and delivered to the defendant. The defendant objected to all evidence as to the purchase made by plaintiff from Byrd and as to contracts which he made with parties to cut the wood from the boundary. These exceptions were based upon the theory that plaintiff could not acquire title to standing timber by verbal contract by virtue of the application of the statute of frauds. It will be observed, however, that the defendant was not a party to the contract between the plaintiff and Byrd from whom he purchased the timber. The authorities are uniform in holding that "the statute of frauds is not available as to third parties, and strangers to the transaction cannot avail themselves of the statute." *Cowell v. Ins. Co.*, 126 N. C., 684; *Bowen v. Perkins*, 154 N. C., 449; *Plaster Co. v. Plaster Co.*, 156 N. C., 455.

The second group of exceptions is based upon the theory that there was no evidence to be submitted to the jury tending to show that the plaintiff would have cut and delivered a substantial quantity of said wood before the expiration of his contract. The evidence tended to show that upon the boundary purchased by plaintiff there was from fourteen hundred to three thousand cords of wood. Plaintiff testified that "he had several different parties of men who had contracts for said portions of this boundary; they had men helping them." There was other testimony to the same effect. While the testimony was to a certain extent indefinite, we cannot say, as a matter of law, that there was no testimony from which the jury would be warranted in drawing a reasonable inference as to the loss plaintiff sustained. The jury awarded the plaintiff $1,250 damages. There was ample evidence that there were over twelve hundred and fifty cords of wood upon the boundary at the time of the breach of the contract by the defendant. There was also ample evidence that the plaintiff had a profit of one dollar a cord under the terms of his contract. Upon the whole record we are of the opinion that the case was properly submitted to the jury and the judgment rendered is approved.

No error.

STATE v. WILL TAYLOR.

(Filed 21 December, 1927.)

1. **Appeal and Error—Rules of Court—Docketing—Dismissal.**

   A prisoner convicted of a capital felony, appealing *in forma pauperis*, must comply with the rules regulating the docketing of cases on appeal, and when he has not done so and fails to file the record proper and move for *certiorari*, on the motion of the Attorney-General the appeal will be docketed and dismissed. Rule 5, 192 N. C., 841, C. S., 4654, allowing the convicted defendant to abandon his appeal in a criminal action in the court below, commented upon.

2. **Same—Record Proper—Motions—Certiorari—Courts—Discretion.**

   The motion for a *certiorari* in the Supreme Court by appellant who has failed to docket his case in time under the requirements of Rule 5, may be allowed, in the discretion of the court, upon the docketing of the record proper and the showing as required for merit and want of laches.

3. **Judgments—Capital Felony—Sentence—Statutes—Appeal and Error.**

   The judgment in this case sentencing the defendant to death for the commission of a capital felony, though making no reference to the trial or the crime of which the defendant was convicted, while not commended is *held* sufficient. C. S., 4659.

MOTION by the State to docket and dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

STACY, C. J. This was a criminal prosecution tried at the April Term, 1927, of GASTON Superior Court, upon an indictment charging the prisoner with burglary in the first degree, which resulted in a conviction and sentence of death. The defendant gave notice of appeal, but has failed to prosecute same, though he was allowed to appeal *in forma pauperis.*

It is now the settled rule of procedure that an appeal from a judgment rendered prior to the commencement of a term of the Supreme Court must be brought to the next succeeding term; and, to provide for a hearing in regular order, it is required that the same shall be docketed here fourteen days before entering upon the call of the district to which it belongs, with the proviso that appeals in civil cases (but not so in criminal cases) from the First, Second, Third and Fourth districts, tried between the first day of January and the first Monday in February, or between the first day of August and the fourth Monday in August, are not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument. Rule 5, Vol. 192, p. 841.

The single modification of this requirement, sanctioned by the decisions is, that where, from lack of sufficient time or other cogent reason, the case is not ready for hearing, it is permissible for the appellant, within the time prescribed, to docket the record proper and move for *certiorari,* which motion may be allowed by the Court in its discretion, on sufficient showing made *(S. v. Angel, ante,* 715), but such writ is not one to which the moving party is entitled as a matter of right. *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562.

Indeed, if the record and transcript are not docketed here at the proper time and no *certiorari* is allowed, the court below, on proof of such facts may, on proper notice, adjudge that the appeal has been abandoned, and proceed in the cause as if no appeal had been taken. *Dunbar v. Tobacco Growers,* 190 N. C., 608, 130 S. E., 505; *Jordan v. Simmons,* 175 N. C., p. 540, 95 S. E., 919; *Avery v. Pritchard,* 93 N. C., 266. And it is provided by C. S., 4654, a statute applicable to criminal cases, that if, for any reason, the defendant wishes to withdraw his appeal, before the same is docketed here, he may go, or be taken, before the clerk of the Superior Court in which he was convicted, and, upon signification of his desire, the said clerk is authorized to enter such withdrawal upon the record of the case, and notify the sheriff, who is directed forthwith to execute the sentence according to the mittimus to him directed.

The prisoner having failed to prosecute his appeal, or to comply with the rules governing such procedure, the motion of the Attorney-General to docket and dismiss must be allowed *(S. v. Dalton,* 185 N. C., 606, 115 S. E., 881), but this we do only after an examination of the record in the case to see that no error appears on the face of the record, and that none was committed on the trial (the case on appeal having been settled by the judge and being before us), as the life of the prisoner is involved. *S. v. Ward,* 180 N. C., 693, 104 S. E., 531.

The judgment, while somewhat informal, as it makes no reference to the trial or the crime of which the prisoner was convicted, is, nevertheless, we conclude, sufficient to meet the requirements of C. S., 4659. This statute provides that when a death sentence is pronounced against any person, convicted of a capital offense, it shall be the duty of the judge pronouncing such sentence to make the same in writing, which shall be filed in the papers in the case against such convicted person and a certified copy thereof transmitted by the clerk of the Superior Court, in which such sentence is pronounced, to the warden of the State penitentiary as his authority for executing such death sentence.

After indictment and arraignment duly had, the prisoner was convicted of burglary in the first degree. Dr. L. N. Glenn, a physician, residing with his family in the city of Gastonia, testified that shortly after midnight, 8 February, 1927, he returned to his home where his wife and children were asleep at the time, and apprehended the prisoner standing in the living room of his dwelling-house, down stairs, on the first floor. An altercation ensued; an alarm was given; the police were called, and the prisoner was arrested on the spot, *in flagranti delicto.*

Nothing was taken from the house, though a chiffonier drawer had been opened, and Mrs. Glenn's purse, which she had left on the table before retiring, had been opened and was lying on the floor. The prisoner had a tack-puller and a pocket knife on his person, and he stated that he came into the house through a window.

While in jail the prisoner told the officers that he went into Dr. Glenn's house "hunting money"; that a colored man by the name of Red was with him, but that the hole in the window was too small for Red to get through, so he remained on the outside.

At the trial the prisoner testified that he was a stranger in Gastonia; that he was on his way from Birmingham, Ala., to Spencer, N. C.; that he got off the train as it passed through Gastonia and asked some colored boys to show him where he could find a place to sleep; that they took him in an automobile, bought some whiskey, and about 11 o'clock that night "he found himself getting drunk," and that he has no recollection of what happened thereafter, except that when he "came to himself" he was in jail.

The case seems to have been tried in strict compliance with the principles of law laid down in *S. v. Allen,* 186 N. C., 302, 119 S. E., 504, and other cognate cases, hence the appeal must be dismissed.

Appeal dismissed.

G. W. COLE ET AL. v. OLIVER SHELTON ET AL.

(Filed 21 December, 1927.)

Actions—Misjoinder—Parties—Causes of Action—Parol Trusts — Mortgages.

Where the complaint in a suit to engraft a parol trust upon the title to lands in favor of a husband and wife, alleges that they gave a mortgage on three tracts of land, the husband having title in two of them and his wife in the other, and that the husband for himself and as agent for his wife had agreed with a third person that the latter should bid it in at the sale and hold the title in trust for them upon certain trust relations: *Held,* in a suit against the administrator of the alleged deceased trustee, the complaint was not demurrable upon the ground of a misjoinder of parties and causes of action.

APPEAL by defendants from *Shaw, J.,* at April Term, 1927, of MADISON.

Civil action to establish a parol trust for an accounting and for damages.

It is alleged that on and prior to 3 October, 1910, G. W. Cole was the owner in fee and in possession of two tracts of land, and the *feme* plaintiff, his wife, was the owner in fee and in possession of a third tract of land, each and all of said tracts being specifically described in the complaint; that on said date the plaintiff, G. W. Cole, being indebted to Fowler Shelton, ancestor and intestate respectively of defendants, in the sum of $10,000, with the joinder of his wife, executed a single deed of trust on all three tracts of land to secure the payment of said indebtedness; that thereafter G. W. Cole, acting for himself and as agent of his wife, so far as her tract of land was concerned, agreed with the said Fowler Shelton that the three tracts of land should be offered for sale under the deed of trust and purchased by the said Fowler Shelton and held by him in trust for plaintiff and his wife on certain conditions set forth in the complaint; that said lands were offered for sale and bid in by defendants' ancestor and intestate respectively, in accordance with the agreement aforesaid, and that the said Fowler Shelton died without having discharged the obligations of his trust. Wherefore plaintiffs bring this action to establish the alleged parol trust for an accounting and for damages.

The defendants demurred, alleging a misjoinder both of parties and causes of action. From a judgment overruling the demurrer the defendants appeal, assigning error.

George M. Pritchard, Thomas S. Rollins and Carter & Carter for plaintiffs.

Guy V. Roberts, J. Coleman Ramsey, John H. McElroy and Mark W. Brown for defendants.

STACY, C. J. The demurrer was properly overruled. It is sufficient to say that the rights of all the parties are dependent upon the establishment or nonestablishment of the alleged parol trust, which grows out of a single agreement, if made at all, affecting all three tracts of land. Hence, it is the one alleged transaction out of which the rights of all the parties arise. C. S., 507. It is observed, also, that the action is one cognizable only in equity. *McNinch v. Trust Co.,* 183 N. C., 33, 110 S. E., 663; 1 R. C. L., 362.

The effect of the judgment entered in the Superior Court was to overrule the demurrer and no more.

Affirmed.

WADE ROSE v. SHEA BROTHERS CONSTRUCTION COMPANY.

(Filed 21 December, 1927.)

1. **Negligence—Instructions—Proximate Cause.**

Where the evidence is conflicting upon the trial of an action to recover damages for an alleged negligent injury received by the plaintiff involving the question of negligence and contributory negligence, it is reversible error for the judge to omit to charge thereunder upon the principle of the proximate cause of the injury sustained, and upon the issue of the plaintiff's contributory negligence.

2. **Appeal and Error—Record—Review.**

The case on appeal to the Supreme Court will be reviewed upon the record, though it appears that the case was agreed upon by the parties and not settled by the judge presiding at the trial.

APPEAL by defendant from *Sink, Special Judge,* at June Term, 1927, of GRAHAM.

Civil action to recover damages for an alleged negligent injury to plaintiff, an employee of defendant, while engaged in his duties as a teamster, moving a heavy air compressor, tried upon the following issues:

"1. Was the plaintiff, Wade Rose, injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

"3. Did the plaintiff assume the risk of his injury as alleged in the answer? Answer: No.

"4. What damage, if any, is the plaintiff entitled to recover? Answer: $3,000."

Judgment on the verdict for plaintiff, from which the defendant appeals, assigning errors.

T. M. Jenkins for plaintiff.
R. L. Phillips for defendant.

STACY, C. J. Consideration of the exceptions *seriatim* is pretermitted, as we find it necessary to award a new trial for error in the following instruction to the jury:

"The court charges you that a party is liable for injury to another where it has not provided machinery and appliances such as are in common and general use. One place is not sufficient to make it common and general use."

The vice of this instruction lies in the fact that it not only omits any reference to proximate cause, but it also eliminates consideration of plaintiff's alleged contributory negligence and assumption of risk on the ultimate issue of liability. The evidence with respect to these issues is not all one way.

The case on appeal was not settled by the judge, and it is possible that the charge, as reported, is incomplete, but we must take the record as we find it. A somewhat similar instruction was considered in the recent case of *Hurt v. Power Co., ante,* 696, and, on authority of what was said in that case, a new trial must be awarded.

New trial.

J. R. SHEFFIELD, W. E. SHEFFIELD AND M. L. SHEFFIELD, PARTNERS, TRADING AS SHEFFIELD BROTHERS, v. PERRY M. ALEXANDER AND J. E. PATTON, INDIVIDUALLY AND AS PARTNERS, DOING BUSINESS AS ALEXANDER & PATTON, AND NATIONAL SURETY COMPANY.

(Filed 21 December, 1927.)

Appeal and Error—Objections and Exceptions—Parties—Causes of Action —Misjoinder—Statutes.

In order to review the action of the referee in permitting amendments to pleadings and the making of new parties, C. S., 576, and contending successfully on appeal that there was a misjoinder of parties and causes of action, it is required that the appellant should have excepted in apt time and have preserved his exceptions or they will not be considered on appeal to the Supreme Court.

APPEAL by National Surety Company from *Harding, J.,* at November-December Term, 1926, of HAYWOOD.

Civil action instituted by J. R. Sheffield, W. E. Sheffield and M. L. Sheffield, partners, trading as Sheffield Brothers, against Perry M. Alexander and J. E. Patton, partners, doing business as Alexander & Patton, and the National Surety Company, to recover on the bond given by the individual defendants as principals, and the National Surety Company as surety, for materials furnished and labor done on State Highway Project No. 940 in Haywood County. Various parties filed interpleas to recover on the same bond, all of which have been disposed of except the interpleas filed by W. H. Porter and W. H. Porter and Wiley Davis.

By consent the cause was referred under the statute to Hon. S. W. Black, who, in accordance with the usual course and practice, found the facts and reported the same, together with his conclusions of law, to the court. On exceptions duly filed, and after hearing had thereon, the report of the referee, with respect to the claims of W. H. Porter for $365, and W. H. Porter and Wiley Davis for $1,271.33, the only ones questioned by the appeal, was approved by the judge of the Superior Court. The National Surety Company appeals, assigning errors.

Mark W. Brown for National Surety Company.
Rollins & Smathers for W. H. Porter et al.

STACY, C. J. Over objection of the National Surety Company the referee allowed Wiley Davis to come in as a party plaintiff and adopt the complaint previously filed by his copartner, W. H. Porter. The authority of the referee to allow amendments to pleadings and to make new parties is expressly given by C. S., 576. *Rosenbacher & Bro. v.*

Martin, 170 N. C., 236, 86 S. E., 785; *Blanton v. Bostic,* 126 N. C., 418, 35 S. E., 1035; *Koonce v. Pelletier,* 115 N. C., 233, 20 S. E., 391.

It is contended by the National Surety Company that by the amendment above mentioned a new and independent cause of action was thereby introduced, entitling it to have the proceeding dismissed on demurrer because of a misjoinder of both parties and causes of action. *Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705. It is sufficient to say, in answer to this position, that the record shows no more than a simple objection and exception noted at the time, and neither the referee nor the judge of the Superior Court was asked to rule upon the question now sought to be presented. The demurrer, upon the ground stated, comes too late. *Godwin v. Jernigan,* 174 N. C., 76, 93 S. E., 443; C. S., 518.

Nor is there any exceptive assignment of error properly raising the question, debated on brief, as to whether the bringing in of Wiley Davis as a party plaintiff so changed the original cause of action instituted in the name of W. H. Porter alone, as to bar a recovery on the ground that said claim was not presented within the time allowed by the statute. Chapter 160, sec. 3, Public Laws 1923; *State Prison v. Bonding Co.,* 192 N. C., 391, 135 S. E., 125. But even if the question were before us, it would seem that C. S., 547, is broad enough to warrant the action of the referee in allowing the amendment, which was later approved by the judge of the Superior Court. 20 R. C. L., 920; 30 Cyc., 567.

A careful perusal of the record leaves us with the impression that the cause has been heard and determined substantially in accord with the principles of law applicable and that the judgment ought to be upheld.

Affirmed.

POSEY COGDILL v. BOICE HARDWOOD COMPANY.

(Filed 21 December, 1927.)

1. **Negligence—Instructions—Proximate Cause—New Trials.**

   Where there is evidence tending to show that the plaintiff was injured by the negligence of the defendant's *alter ego* in charge of work in a cut where the plaintiff was engaged in the scope of his employment, by a piece of ice sliding down a mountain slope and striking him, an instruction that does not refer to the question of negligence or proximate cause, is to the defendant's prejudice and reversible error.

2. **Instructions—Statutes—Expression of Opinion—Negligence—Damages.**

   In an action to recover damages for a permanent injury alleged to have been negligently inflicted, an expression in the charge as to the presumed time the plaintiff would live, and the consequent diminution of his earning capacity, falls within the inhibition of our statute, C. S., 564.

3. Appeal and Error—Record—Case.

Where the case on appeal has not been settled by the trial judge, but by agreement of counsel, that appearing in the record will control.

APPEAL by defendant from *Stack, J.,* at May Term, 1927, of HAYWOOD.

Civil action to recover damages for an alleged negligent injury caused by a piece of ice sliding down the side of a mountain and striking the plaintiff as he was at work for the defendant in a railroad cut or fill, tried upon the usual issues of negligence, contributory negligence and damages, and resulting in a verdict and judgment for plaintiff, from which the defendant appeals, assigning error.

W. R. Francis for plaintiff.
Alley & Alley for defendant.

STACY, C. J. There are two exceptive assignments of error appearing on the record which make it necessary to remand the cause for another hearing.

On the issue of negligence the jury was instructed as follows:

"If you find by the evidence that he is permanently injured and his earning capacity has been decreased by reason of his injury, and if you find his neck is stiff, permanently stiff, he would be entitled to recover for the decreased earning power to make money, if you find that he was injured by the piece of ice falling down the side of the mountain and hitting him on the shoulder, and there is evidence to show that it had snowed previously thereto and that ice and rock were, on account of the weather, falling down the side of the cut or mountain, and that the defendant's foreman was present and saw this condition and knew what the conditions were."

Certainly, unless free from blame himself, the plaintiff would not be "entitled to recover" upon the facts here stated, and there is no reference in the instruction to negligence or proximate cause. In this respect the charge is defective. *Hurt v. Power Co., ante,* 696.

Again the court instructed the jury as follows:

"I believe he said he is 27 years old, and he is presumed to live a certain number of years, and will be compelled to bear that permanent injury and be afflicted by it and his earning capacity in the future will be decreased by reason of that condition."

Appellant contends that this instruction contains an inadvertent expression of opinion on the alleged permanency of plaintiff's injury. C. S., 564. While, of course, unintentional on the part of the learned judge who tried the case, we think the instruction is fairly amenable to the criticism made by the defendant. *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *Speed v. Perry,* 167 N. C., 122, 83 S. E., 176. The error is just one of those casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit. *S. v. Allen,* 190 N. C., 498, 130 S. E., 163; *S. v. Kline,* 190 N. C., 177, 129 S. E., 417. Indeed, the case on appeal was not settled by the judge, and it is possible that the charge, as reported, is not as given, but we are bound by the record. *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6; *S. v. Wheeler,* 185 N. C., 670, 116 S. E., 413.

For the errors as indicated a new trial must be awarded, and it is so ordered.

New trial.

DALLAS RADFORD v. T. P. YOUNG ET AL.

(Filed 21 December, 1927.)

1. **Negligence—Highways—Rules of State Highway Commission—Criminal Law—Proximate Cause.**

   One walking along a State highway on the right side thereof in violation of a rule of the State Highway Commission, making it a misdemeanor under authority of statute, may recover damages when such violation is not the proximate cause of the injury in suit.

2. **Jury—Relationship of Jurors—Prejudice—Appeal and Error.**

   Where two of the jurors trying the case are related to a party litigant, and the trial judge has found that they were unaware of the relationship at the time, and the verdict was without prejudice, it will not be disturbed on appeal.

CIVIL ACTION, before *Deal, J.,* at September Term, 1927, of BUNCOMBE.

The plaintiff instituted an action for damages against the defendants, alleging that a truck owned by the defendants and operated by their agent, and while engaged in their business, ran over and injured him while he was walking upon the highway and traveling toward Weaverville. The evidence tended to show that the truck approached plaintiff from the rear and knocked him down. Defendant offered evidence tending to show that the truck was not being used in their business at the time and that plaintiff was guilty of contributory negligence, barring recovery. Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff.

From judgment upon the verdict the defendant appealed.

C. R. Edney and Rollins & Smathers for plaintiff.
Ellis Jones and George M. Pritchard for defendants.

BROGDEN, J. Public Laws of 1923, chapter 160, authorizes the State Highway Commission to make rules, regulations and ordinances regulating the use of the State highways, and further providing that the violation of any such ordinances so prescribed shall constitute a misdemeanor. Sections 29 and 30 of the ordinances of the State Highway Commission, admitted in evidence, provide as follows: "Pedestrians walking on the highways shall keep on the left-hand side of the road. Any violation of the foregoing rules, regulations or ordinances shall constitute a misdemeanor and be punished as provided by statute."

The defendant offered evidence tending to show that at the time of his injury the plaintiff was walking on the right-hand side of the highway in violation of said ordinance. The plaintiff, however, contended that he was not walking on the pavement at all, testifying in regard thereto as follows: "There never was any road where I was walking. I was off the highway." One of the questions presented by the appeal was whether or not walking along the right-hand side of the highway in violation of the ordinance constituted contributory negligence. The judge charged the jury in substance that if they should find that the plaintiff was walking on the right side of the highway in violation of the ordinance enacted by the State Highway Commission, and that if such conduct was the proximate cause of the injury, plaintiff was not entitled to recover. This is a correct interpretation of the law. *Delaney v. Henderson-Gilmer Co.,* 192 N. C., 647.

The defendant also made a motion to have the verdict set aside because it appeared that two jurors were related to plaintiff within the ninth degree. The court found as a fact that neither juror knew of the relationship at the time the jury was selected and the verdict rendered, and that the verdict was in "nowise influenced by the relationship."

Whereupon the court, upon such finding of fact, refused to set aside the verdict in the exercise of discretion. This exception to such refusal cannot be sustained. *S. v. Crane,* 110 N. C., 530; *S. v. Adkins, post,* 749.

There are other exceptions in the record, but a careful examination of the evidence and charge of the court convinces us that no error of law was committed in the trial of the cause.

No error.

STATE v. MERRITT ADKINS.

(Filed 21 December, 1927.)

Jury—Verdict—Influence—Motion to Set Aside Verdict — Courts — Motions—Discretion of Court—Appeal and Error—Review.

Communications made to the jury by the officer in charge of them during their deliberation of the verdict in a criminal action, that defendant's relatives had endeavored to obtain lodging in the same boarding house with them, will not be sufficient to set aside a verdict against him when the trial judge, in his investigation, finds upon the evidence on defendant's motion, that the defendant had not been prejudiced, and refuses to set aside the verdict as a matter in his discretion.

CRIMINAL ACTION, before *Parker, J.,* at March Term, 1927, of YANCEY.

The defendant was indicted for murder, but upon calling the case the solicitor announced that the State would not ask for a verdict of guilty in the first degree, but would ask for a conviction of murder in the second degree. The jury found the defendant guilty of manslaughter, and from the judgment imposing imprisonment in the State's prison for a term of not less than five nor more than seven years the defendant appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Charles Hutchins, and Watson, Hudgins, Watson & Fouts for defendant.

BROGDEN, J. The record discloses that the only exceptions relied upon by the defendant related to the misconduct of the officer in charge of the jury, in communicating to the jury, while engaged in its deliberations, the fact that the defendant and his wife and daughter had applied for lodging to the boarding house or hotel at which the jury was quartered. After the verdict was rendered the trial judge very promptly and very properly cited the officer for contempt of court. The defendant lodged a motion to set aside the verdict because of the misconduct of the officer. The court examined the jurors, touching the incident, in order to ascertain if their verdict had been influenced by the communication. The record shows the following entry: "After a consideration of the foregoing testimony the court finds as a fact that the defendant's rights were not prejudiced by the conduct of the officer and report to jury and the conduct of the jury." Thereupon the court declined to set aside the verdict.

While the trial judge would have been fully justified in setting aside the verdict, this Court cannot do so for the reason that it is found as a fact that the rights of the defendant were not prejudiced by the alleged misconduct. "The finding of such fact by the presiding judge, who is far better acquainted with the surroundings than we can possibly be, is conclusive, and we cannot look into the affidavits, whether one or more, to reverse such finding." *S. v. Crane,* 110 N. C., 530. Undoubtedly the discretion committed to the trial judge is a sound, legal discretion and not to be exercised arbitrarily or capriciously. However, there was sufficient evidence to sustain the finding that the verdict had not been influenced or tainted by the misconduct of the officer. Therefore, the judgment of the court must stand.

No error.

SPENCER TYSON v. L. D. FRUTCHEY.

(Filed 21 December, 1927.)

Negligence—Automobiles—Evidence—Nonsuit.

In an action to recover damages for an injury negligently caused in a collision by one driving the defendant's auto truck on the highway with plaintiff's automobile, evidence tending only to show that the defendant had loaned the truck to a tenant on his farm to be used for the latter's purposes, upon condition that the tenant have a careful driver, and that accordingly a driver was obtained: *Held,* defendant's motion as of nonsuit thereon should have been granted.

CIVIL ACTION, before *Schenck, J.,* at April Term, 1927, of MONTGOMERY.

The plaintiff instituted suit against the defendant for damages for injury to his automobile, resulting, as plaintiff alleged, from the negligence of the defendant.

Upon the issues submitted to the jury there was a verdict for the plaintiff for $200. From judgment upon the verdict the defendant appealed.

B. S. Hurley and M. C. Lisk for plaintiff.
Armstrong & Armstrong and Claudius Dockery for defendant.

BROGDEN, J. There was sufficient evidence of the negligent operation of defendant's truck by the driver thereof to be submitted to the jury, but the real question in the case is whether or not the defendant is liable in damages for such negligent operation.

The undisputed testimony discloses the following facts: The defendant is a farmer and a merchant. On 29 August, 1924, he owned a truck which he used in connection with his mercantile business. Bennett Robinson was a tenant living upon the land of the defendant and paying for the use of the land a stipulated rental. Robinson asked the defendant to loan him the truck for the purpose of going to church. The defendant told Robinson that, as his sight was impaired, he would not lend him the truck for such purpose unless he should procure a competent driver. Robinson then went off and thereafter returned and informed the defendant that he could get one Robert Chambers to drive the truck. Whereupon the defendant consented that Robinson could use the truck for the purpose requested. There is no evidence that Chambers was an incompetent driver. At the time the truck left defendant's possession it was in good condition. Chambers did all the driving. In returning from church the evidence tended to show that defendant's truck driven by Chambers collided with the plaintiff's automobile, resulting in the injury complained of.

Upon these admitted facts the principle announced in *Reich v. Cone,* 180 N. C., 267, applies, and determines the rights of the parties. In that case *Clark, C. J.,* said: "When a motor car is used by one to whom it is loaned for his own purposes, no liability attaches to the lender unless, possibly, when the lender knew that the borrower was incompetent, and that injury might occur." The same principle was declared in *Thorp v. Minor,* 109 N. C., 152, and in *Grier v. Grier,* 192 N. C., 760.

The plaintiff relies upon *Freeman v. Dalton,* 183 N. C., 538, but this case was distinguished in *Grier v. Grier, supra.* We hold, therefore, that the motion for nonsuit at the conclusion of all the evidence should have been allowed.

Reversed.

STATE v. JIM WALDROOP.

(Filed 21 December, 1927.)

Homicide—Instructions—Murder—Manslaughter—Self-Defense.

The charge of the judge to the jury in this action for the commission of a homicide is approved on the principles of second-degree murder, manslaughter and self-defense in the same case as reported in 193 N. C., p. 12.

APPEAL by defendant from *Stack, J.,* and a jury, at April Term, 1927, of CHEROKEE. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Moody & Moody for defendant.

CLARKSON, J. This case was here before, *S. v. Waldroop,* 193 N. C., p. 12. The writer of the main opinion said, at p. 14: "The record discloses evidence tending to establish each of the three degrees of felonious homicide as well as the defendant's right to acquittal on the ground of self-defense."

The defendant was convicted of manslaughter and a new trial granted, two Justices dissenting—not on the law as stated, but the interpretation put on the instruction. In the present case defendant was found "guilty of murder in the second degree." In neither trial did the State ask for conviction of defendant for murder in the first degree, although, from the record, there was evidence on the part of the State, if believed by the jury, sufficient to sustain a conviction.

As to the evidence bearing on self-defense, the court below charged as follows: "But if he has satisfied you from the evidence that the killing was without malice, but has failed to satisfy you that the killing was not unlawful, then he would be guilty of manslaughter and that would be your verdict. But, if he has rebutted, to your satisfaction, both of the presumptions raised by the law from the killing with a deadly weapon, and has satisfied you, gentlemen of the jury, that he had been assaulted by the deceased with a pistol, and that by reason of such assault, while free from blame himself and in the exercise of ordinary firmness, he actually feared and had reasonable grounds to fear that his life was in danger or that he was in danger of great bodily harm, and that he used such force only as was necessary, or such force as appeared to him reasonably necessary at the time to save his life or to protect himself from great bodily harm, such necessity, real or apparent, to be determined by you and not him, upon all the facts and circumstances as they reasonably appeared to him at the time and under these conditions, if you find that the defendant took the life of the deceased, the homicide would be excusable and your verdict would be 'not guilty.' "

In the charge the court below was following the opinion of this Court on the former appeal. On the whole record we can find no prejudicial or reversible error.

No error.

T. E. HEARN v. C. B. OSTRANDER AND FORD MOTOR COMPANY.

(Filed 21 December, 1927.)

1. **Libel and Slander—Slander—Principal and Agent — Privileged Communications—Actions.**

   Where the superintendent of his codefendant's plant has information that an employee thereat had taken therefrom certain articles belonging to the codefendant employer, and had them in his possession at his home contrary to the rules of his codefendant, it is the duty of the defendant superintendent to make investigation for his employer, and remarks made by him solely and necessarily in the course of his investigation and for its purpose, that the plaintiff had stolen these articles so found, are privileged, and when made without malice, are not actionable.

2. **Same—Malice—Evidence—Questions for Jury — Appeal and Error — New Trials.**

   Evidence tending to show that the defendant superintendent exhibited certain articles found in the home of an employee contrary to the rules of his codefendant, his principal, and after making the investigation upon which he uttered the alleged slanderous words concerning the plaintiff, is sufficient to carry the case to the jury upon the question of whether the words claimed to have been privileged were spoken with malice.

APPEAL by defendants from *Harding, J.,* at March Term, 1927, of MECKLENBURG. New trial.

Action to recover of both defendants damages for slander, alleged to have been uttered by defendant, C. B. Ostrander, while engaged in the performance of his duties as superintendent of his codefendant, Ford Motor Company.

Plaintiff alleges in his complaint that defendant, C. B. Ostrander, while engaged in the performance of his duties as superintendent of defendant, Ford Motor Company, at its plant located at Charlotte, N. C., "did on or about 20 March, 1925, unlawfully, falsely and maliciously say and publish of and concerning the plaintiff, in the presence of T. N. Owen and others, the following false and defamatory matters, to wit, that the said plaintiff did, in many instances, while in the employ of the Ford Motor Company, steal spark plugs and other articles, the property of the Ford Motor Company."

This allegation is denied in the answer. Defendants further plead in defense that such statements as were made by defendant, C. B. Ostrander, of and concerning the plaintiff, on the occasion referred to in the complaint, were privileged communications, made without malice, from which no action arose in favor of plaintiff and against defendants, or either of them.

It is admitted that said defendant, C. B. Ostrander, was the superintendent of the Ford Motor Company, and on the occasion referred to in the complaint was engaged in the performance of his duties as such superintendent.

The issues submitted to the jury were answered as follows:

1. Did the defendant, Ostrander, in substance, say of and concerning the plaintiff, that the plaintiff did, in many instances, while in the employ of the Ford Motor Company, steal spark plugs and other articles, the property of the Ford Motor Company, as alleged in the complaint? Answer: Yes.

2. If so, were said words spoken by the defendant, Ostrander, with actual malice toward the plaintiff? Answer: Yes.

3. What damages, if any, is the plaintiff entitled to recover of the defendants? Answer: $2,500.

From judgment on the verdict, defendants appealed to the Supreme Court.

F. W. Orr and Pharr & Currie for plaintiff.
Tillett, Tillett & Kennedy for defendants.

CONNOR, J. The testimony of plaintiff, together with other evidence in his behalf, pertinent to the first issue, was properly submitted to the jury, and although sharply contradicted by evidence in behalf of defendants, was sufficient to sustain the answer of the jury to said issue. No assignments of error on defendants' appeal to this Court are based upon exceptions to evidence pertinent to this issue, or to instructions of the court more particularly applicable to said issue.

Plaintiff, however, is not entitled to recover in this action upon an affirmative answer to the first issue. It is conceded by his counsel that the words which the jury has found were spoken of and concerning plaintiff by defendant, C. B. Ostrander, on the occasion referred to in the complaint, were privileged. This defendant had received information, as superintendent of the plant of the Ford Motor Company, tending to show that plaintiff, an employee of said company, had on several occasions, in the city of Charlotte, swapped Champion spark plugs of the kind used by said company in its plant for equipping its cars, for gasoline, under circumstances which properly aroused the suspicion of his informant that plaintiff's possession of the said spark plugs was unlawful. It was manifestly the duty of said defendant, as superintendent of the plant, in which plaintiff was employed, to investigate this matter. The words complained of by plaintiff were spoken by said defendant while conducting said investigation. Upon all the evidence, the occasion on which the words were spoken by defendant, Ostrander, was such that they constitute a privileged communication, for which no action lies unless the words were spoken with actual malice. Plaintiff, therefore, cannot recover in this action unless there was evidence tending to sustain an affirmative answer to the second issue, and unless, further, such evidence was submitted to the jury by the court under instructions which are free from error. If there was error with reference to the admission of evidence and its submission to the jury for its consideration upon the second issue, notwithstanding there was other evidence to which there was no valid objection, which was sufficient to sustain an affirmative answer to said issue, defendants are entitled to a new trial.

There was evidence to the effect that during the afternoon of the day on which plaintiff was discharged from the employment of the Ford Motor Company, following the occasion on which the words were spoken by defendant Ostrander, as found by the jury in its answer to the first issue, a number of articles discovered in plaintiff's home, upon a search made by employees of the company, with its permission, were exhibited in the plant, with a placard attached showing that said articles had been found in the home of an employee, taken by him from the plant, in violation of a rule of the company. There was nothing on the placard to show that these articles had been found in plaintiff's home, or to connect plaintiff with the articles. Plaintiff contended that these articles were exhibited in the plant for the inspection of all the employees, pursuant to the direction and under the orders of defendant Ostrander, and that this was evidence of his actual malice toward plaintiff, at the time the words were spoken by him during the morning, while plaintiff was in the private office of said defendant. There was no evidence to sustain this contention. There was, on the contrary, affirmative evidence that defendant, Ostrander, for whose tort plaintiff contends the Ford Motor Company is liable, upon the principle of *respondeat superior,* had no connection with the exhibit. It was error, prejudicial to both defendants, to admit as evidence the testimony of witnesses, with respect to the exhibit. Defendants objected to this testimony and excepted to its admission, over their objections. Their assignments of error based upon these exceptions are sustained.

We do not now pass upon defendants' contention that with the evidence relative to the exhibits excluded, there is, certainly, no evidence from which the jury could answer the second issue in the affirmative, and that, therefore, their assignment of error based upon the exception to the refusal of the court to allow their motion for judgment as of nonsuit should be sustained. Plaintiff should not be precluded from offering upon a new trial, if he can, other evidence to sustain his contention with respect to the second issue. When the evidence with respect to the exhibit was admitted by the court, although as we hold, erroneously, he had the right to rely upon such evidence. Upon a new trial he may be able to offer other evidence tending to sustain his contention that defendant, Ostrander, in speaking the words as found by the jury, was moved by actual malice toward him.

There are other assignments of error upon this appeal based upon exceptions which seem to have been well taken. It is not necessary to discuss them. For the error in the admission of evidence for the consideration of the jury on the second issue there must be a

New trial.

THEODOSIA TUCKER v. PARK YARN MILL COMPANY.

(Filed 21 December, 1927.)

1. **Landlord and Tenant—Master and Servant—Employer and Employee.**

   A cotton mill furnishing houses to its employees for a rent deducted from salary establishes the relationship of landlord and tenant in respect to the houses so furnished, and not that of master and servant.

2. **Same—Duty to Repair—Damages.**

   The liability of a cotton mill which furnishes houses to its employees for a rent is no greater than that of a landlord in respect to such houses, and in the absence of a contract to repair, it owes no duty to the tenant to repair, or to keep in repair, and it is not liable for personal injuries resulting from defective condition in the premises existing at the time tenant took possession, unless such defect was hidden, within the knowledge of the landlord, and could not have been discovered by the tenant on reasonable inspection, the doctrine of *caveat emptor* applying.

3. **Same—Contract to Repair—Damages.**

   In this case the landlord, a mill, is not liable to its tenant, an employee therein, for damages for personal injury caused by a defect in the house rented, due to lack of repair, even though in the rental contract the landlord contracted to repair, damages in this case being too remote and not within the contemplation of the parties. *Jordan v. Miller*, 179 N. C., 73, and *Duffy v. Hartsfield*, 180 N. C., 151, cited and approved.

4. **Appeal and Error—Nonsuit.**

   A judgment as of nonsuit will be sustained in an action by a tenant for damages resulting from a defect in the premises rented unless it is shown that the defect was peculiarly within the knowledge of the landlord, and could not have been discovered by the tenant upon reasonable inspection.

APPEAL by plaintiff from *Townsend, Special Judge,* at May Special Term, 1927, of GASTON. Affirmed.

Action to recover damages for personal injuries sustained by plaintiff, and caused by her fall through a hole in the porch of a house occupied by her and owned by defendant.

From judgment of nonsuit dismissing the action plaintiff appealed to the Supreme Court.

A. E. Woltz and J. L. Hamme for plaintiff.
J. Laurence Jones and George B. Mason for defendant.

CONNOR, J. Plaintiff upon her appeal to this Court relies principally upon her assignments of error based upon exceptions, first, to the order of the court allowing defendant's motion for judgment as of nonsuit, at the close of her evidence; and, second, to the judgment dismissing the action, in accordance with said order.

The evidence for plaintiff tended to show that some time prior to 27 April, 1926, she was employed by defendant as a spinner in defendant's mill, located at Kings Mountain, N. C. Defendant had agreed to pay her as wages the sum of $15.36 per week, and also to furnish her a house in which to live during such time as she continued in its employment. As rent for the said house plaintiff was charged sixty cents per week, which sum was deducted from her weekly wages.

Prior to her beginning work for defendant as its employee, plaintiff was shown the house which defendant proposed to furnish her, in accordance with its agreement. She discovered that this house was in bad repair, and called this fact to the attention of defendant's agent. The agent informed her that defendant did not at the time have any other house which it could furnish her, but stated that this house would be repaired. Plaintiff testified that the porches were in worse condition than other parts of the house—that they were completely rotten. She, however, moved into the house and began work for defendant in its mill. She continued to work for defendant for five weeks, during which time defendant did not repair or fix the house, although it agreed to do so, from time to time, when plaintiff complained of its condition. It remained in the same condition it was in at the time she moved into it.

On the day she was injured plaintiff went on the back porch to throw out some water. As she turned around to go back into the house a plank broke under her left foot, causing her to fall through the porch. The floor of the porch was about three and one-half feet from the ground. As the result of her fall, plaintiff was badly injured. She was compelled to go to a hospital for treatment, where she suffered great pain and incurred large expense for medical attention and nursing. She contends that her injuries were caused solely and proximately by the negligence of defendant: first, in failing to furnish her a safe place in which to live while working in defendant's mill, under her contract with defendant; and, second, in failing to repair the house furnished to her in accordance with its agreement made before she moved into it.

If upon all the facts which the evidence tends to establish, the relationship between defendant and plaintiff, with respect to the house, was that of landlord and tenant, with only such rights and duties as are ordinarily incident to such relationship, then upon all the authorities, in the absence of an agreement on the part of defendant, as a part of its rental contract, to repair the house and to keep it in repair, defendant owed no duty to plaintiff with respect to such repairs, and is not liable to plaintiff for personal injuries resulting from defective conditions existing at the time plaintiff accepted and moved into the house. In *Fields v. Ogburn,* 178 N. C., 407, the law is said to be that "in the absence of express stipulation on the subject, there is usually no obligation or assurance on the part of the landlord to his tenant, that the premises will be kept in repair or that the same are fit or suitable for the purposes for which they are rented. It is true that in case of latent defects of a kind that import menace of appreciable injury when they are known to the landlord, and of which the tenant is ignorant and not likely to discover on reasonably careful investigation, liability has been recognized and recoveries sustained both on the ground of negligent breach of duty, and at times for fraud and deceit, but ordinarily, as stated in the well-sustained brief of appellee's counsel, there is no implied covenant in a lease of such property, either that the place is let for habitation, or that the owner will keep the same safe and in repair, and ordinarily the doctrine of *caveat emptor* applies to leases of realty and throws on the lessee the responsibility of examining as to the existence of defects on the rented premises and of providing against their ill effects. This statement of the law is approved in *Duffy v. Hartsfield,* 180 N. C., 151.

In *Jordan v. Miller,* 179 N. C., 73, it is said that even where the lessor contracts to keep the premises in repair, the breach by the landlord of his contract will not ordinarily entitle the tenant, personally injured by a defect therein, existing because of the negligence of the landlord in failing to comply with his agreement to repair, to recover indemnity for such injury, whether in contract or in tort, since such damages are too remote and cannot be said to be fairly within the contemplation of the parties.

In *Hudson v. Silk Co.,* 185 N. C., 342, the statements of the law as contained in the opinions in the foregoing cases, with respect to the liability of a landlord to a tenant, for personal injuries caused by the defective condition of the premises, are approved, although it is suggested in the opinion in that case that there may be exceptions to the law as therein stated. No facts, however, appeared upon the record which called for a discussion of exceptions to the general principles upon which the question presented by the appeal in that case was decided.

Counsel for plaintiff, in their brief, and also on the argument in this Court, evidently appreciating that the judgment of nonsuit in this case is sustained by authoritative decisions of this Court, contend that, although it shall be held that the relationship of defendant to plaintiff, with respect to the house, is that of landlord and tenant, upon the facts alleged in the complaint and shown in the evidence, defendant is liable to plaintiff, under exceptions to the general principles applicable to such relationship. We have given this contention careful consideration, but are unable to hold that the contention is well sustained. It may be conceded that cases may be presented in which a landlord shall be held liable to a tenant for personal injuries resulting from a negligent breach of an agreement to repair. In the absence of a statute, however, relative to this matter, we do not undertake to determine under what conditions and upon what facts, the landlord may be held liable to a tenant who has suffered a personal injury caused by the negligent failure of the landlord to comply with his contract to repair or to keep in repair the premises.

Nor can the further contention of plaintiff that the relationship between the parties to this action, while plaintiff was occupying house, was that of master and servant, or employer and employee, and not that of landlord and tenant, be sustained. While plaintiff was in defendant's mill, engaged in the performance of her duties as its employee, the relation between them was that of employer and employee, but while she was in the house, occupying it as her home, defendant was her landlord and she was its tenant. It cannot be held that plaintiff, while in the house furnished her by defendant, to be occupied by her as her home, was in a place furnished by her employer for the performance of her duties as an employee. The house was not furnished her as a place in which to work. When she entered this house she was in her home. There she was under no duty to defendant as its employee, nor did defendant owe her any duty, while she was in the house, as her employer. Its duties to her, while in the house, arose solely from the relationship of landlord and tenant. It is well settled by the decisions of this Court that ordinarily a landlord owes no duty to the tenant to repair the premises, and is not liable ordinarily for personal injuries sustained by the tenant, although such injuries are caused by the negligent breach of an agreement to repair.

The judgment dismissing the action as upon nonsuit is sustained by authoritative decisions of this Court. This case cannot be distinguished from the cases in which such decisions were made. These decisions are in accord with well-settled general principles, and must be regarded as authorities sustaining the judgment in this case.

Affirmed.

PERRY HYATT v. W. L. McCOY.

(Filed 21 December, 1927.)

1. **Verdict — Reduction of Damages — Consent — Discretion of Court — Judgments—Statutes—Constitutional Law—Appeal and Error.**

The discretionary power of the trial judge to set aside the verdict of the jury for "excessive" or "inadequate" damages, does not extend to his authority to reduce the verdict and render judgment accordingly, unless assented to by the party against whose interest it has been done, C. S., 591, Constitution of N. C., Art. IV, sec. 8, and without this consent the Supreme Court, on appeal, will direct that the amount of the judgment be entered according to the verdict.

2. **Husband and Wife—Seduction—Alienation of Wife's Affection—Evidence.**

In an action brought by the husband to recover damages for seduction and the alienation of his wife's affection, it is competent to show in connection with other probative evidence introduced at the trial, for the purpose either of corroboration or the means by which the wife's affections were alienated, the defendant's offer of money, efforts to have the wife leave the State, repeated expressions of his affection for her, and the effect the defendant's conduct had on the mind of the plaintiff.

3. **Same—Personal Injuries.**

In an action brought by the husband for the seduction of his wife, and the alienation from him of her affections, it is competent to show that the husband was paralyzed from a personal injury received while in defendant's employment, which was made use of by the latter for the accomplishment of his purpose, and allegations to that effect in the complaint should not be stricken out on defendant's motion.

4. **Same—Subsequent Relations of Husband and Wife—Intercourse.**

Where the evidence tended to show that the plaintiff, in an action to recover damages for the seduction of his wife and the alienation from him of her affections, had received a personal injury while in the service of the defendant, and that the defendant made use of this injury in the pursuit of his purpose, evidence that since the injury he had not had intercourse with his wife is properly excluded, on the issue as to whether the defendant had had immoral relations with her.

5. **Appeal and Error—Evidence Withdrawn From Jury—Instructions—Objections and Exceptions.**

The admission of improper or incompetent evidence, when ordered stricken out by the court, does not constitute reversible error, especially when the jury is particularly instructed not to consider or be influenced by it.

6. **Husband and Wife—Seduction—Alienation of Wife's Affection—Evidence—Declarations.**

In an action by the husband to recover damages for the alienation of his wife's affections, etc., testimony by the plaintiff of conversations he had had with her, is competent on the question of corroborating his wife's evidence and to show in part his humiliation, bearing upon the issue as to his damages, but not as to the criminal conversation between the defendant and the plaintiff's wife.

7. **Appeal and Error—Instructions—Excerpts From Charge.**

Excerpts from the judge's instructions to the jury will not be held for error, if construed in connection with related parts of the entire charge, no error has been committed.

APPEAL from *Black, Emergency Judge,* at November Special Term, 1926, of MACON.

The plaintiff brought suit to recover damages for the seduction of his wife and the alienation of her affections. The jury returned the following verdict:

1. Did the defendant, W. L. McCoy, alienate the affections of plaintiff's wife, as alleged in the complaint? Answer: Yes.

2. Did the defendant, W. L. McCoy, have immoral relations with the plaintiff's wife, as alleged in the complaint? Answer: Yes.

3. What amount of actual damages, if any, is the plaintiff entitled to recover? Answer: $10,000.

4. What amount of punitive damages, if any, is the plaintiff entitled to recover? Answer: $2,000.

Judgment in favor of plaintiff for $10,000. Both the plaintiff and the defendant appealed for error assigned. On plaintiff's appeal reversed; on defendant's appeal no error.

Horn & Poindexter and Bryson & Bryson for plaintiff.

Moody & Moody, McKinley Edwards and H. G. Robertson for defendant.

PLAINTIFF'S APPEAL.

ADAMS, J. When the plaintiff moved for judgment upon the verdict the trial judge "in the exercise of his discretion" reduced the sum awarded as actual damages in answer to the third issue from $10,000 to $8,000, and the plaintiff excepted. The exception presents the question whether the order reducing the damages was a matter of discretion and therefore reviewable only in case of abuse or whether it involved a matter of law or legal inference within the meaning of Article IV, section 8 of the Constitution.

It is provided by statute that the judge who tries the cause may in his discretion entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial . . . for excessive damages (C. S., 591); and it has been said "that there is no reason which can be advanced in favor of setting aside verdicts because of excessive damages which does not apply to setting aside for inadequacy of damages." *Benton v. Collins,* 125 N. C., 83. So it has been held in a number of cases that to set aside a verdict and to grant a new trial for excessive or inadequate damages is, as a rule, the irreviewable right of the presiding judge. *Benton v. R. R.,* 122 N. C., 1008; *Burns v. R. R.,* 125 N. C., 304; *Gray v. Little,* 127 N. C., 304; *Phillips v. Telegraph Co.,* 130 N. C., 513; *Abernethy v. Yount,* 138 N. C., 337; *Boney v. R. R.,* 145 N. C., 248; *Billings v. Observer,* 150 N. C., 540; *Decker v. R. R.,* 167 N. C., 26.

But this Court has been equally positive in holding that the trial judge cannot amend, reform, or reduce the amount of a verdict and give judgment thereon as reformed or amended without the consent of the party in whose favor the verdict was returned. *Shields v. Whitaker,* 82 N. C., 516; *Sprinkle v. Wellborn,* 140 N. C., 163; *Isley v. Bridge Co.,* 143 N. C., 51; *Cohoon v. Cooper,* 186 N. C., 26, 28. Many of the authorities sustaining this position have been collected and cited in the note to *Tunnel Co. v. Cooper,* 39 L. R. A. (N. S.), 1064. See, also, *Harvey v. R. R.,* 153 N. C., 567. In *Brown v. Power Co.,* 140 N. C., 333, the verdict was reduced, but the plaintiff did not except.

In reducing the compensatory damages from $10,000 to $8,000 in disregard of the plaintiff's objection to the diminution and in giving judgment on the verdict for the diminished amount the court committed an error which the plaintiff is entitled to have corrected. To this extent the judgment should be reformed.

Reversed.

DEFENDANT'S APPEAL.

ADAMS, J. Of the one hundred and sixty assignments of error sixty-eight are left out of the appellant's brief and must be treated as abandoned. 192 N. C., 852, Rule 28. We have examined those which have not been abandoned and find it as unnecessary as it is inexpedient to discuss them separately. Many of them, relating to the same subject-matter, may be considered together. Those in the first group, subdivided as (a), (b), (c) and (d) in the appellant's brief have reference to testimony which was admitted for the purpose either of corroboration or of showing the means by which the defendant alienated the affections of the plaintiff's wife, including the offer of money, efforts to have her leave the State, repeated expressions of his affection, or the effect the defendant's conduct had on the mind of the plaintiff. We see no reason for the rejection of this evidence. It was certainly pertinent to the first issue; and in our opinion, when considered in connection with the first two issues, the court's refusal to strike out the whole of the fifth and sixth paragraphs of the complaint was free from error. These paragraphs set forth the paralyzed condition of the plaintiff resulting from personal injury received while in the defendant's service, and according to the plaintiff's evidence made use of by the defendant for the accomplishment of his purpose. The court withdrew from the jury all evidence tending to show that since the plaintiff's injury there had been no intercourse between him and his wife, and expressly cautioned the jury not only that this evidence should not be considered, but that the testimony of Mrs. Hyatt should be considered so far as it tended to establish the matters involved in the first but not in the second issue.

The admission of improper or incompetent evidence which is withdrawn from the jury and stricken out will not constitute reversible error, especially when the jury is particularly instructed not to consider it or to be influenced by it in making up the verdict. In *S. v. May,* 15 N. C., 328, *Ruffin, C. J.,* remarked: "If improper evidence be received, it may afterwards be pronounced incompetent, and the jury instructed not to consider it"; and the principle embodied in this concise statement has been recognized and enforced without material variation. *McAllister v. McAllister,* 34 N. C., 184; *Gilbert v. James,* 86 N. C., 245; *Toole v. Toole,* 112 N. C., 153; *Cowles v. Lovin,* 135 N. C., 488; *Cooper v. R. R.,* 163 N. C., 150; *Raulf v. Light Co.,* 176 N. C., 691. But the appellant contends that the error was not cured because the jury was instructed to consider all the evidence. That the instruction referred to all the evidence which had been admitted and had not been withdrawn is apparent from the positive caution given in the following parts of the charge: "The court cautions you and charges you that it is the law that the testimony of Mrs. Hyatt can only be considered with reference to the charge of alienation of her affections. Our law does not permit, and very wisely, a woman in a situation of this kind to testify as to facts which would tend to establish the second charge in this case, that is, the charge of criminal intercourse. Our lawmakers have in their wisdom decided this would lay down too broad an opening for fraud and collusion, and have enacted a statute prohibiting a woman in all cases of this kind to testify as to acts of adultery. . . . Upon the second issue the court charges the jury that the wife of the plaintiff is not a competent witness for the plaintiff to show criminal intercourse between herself and the defendant, and the jury in passing upon this issue will not consider her testimony for such purpose."

Other exceptions under subdivision (d), taken to the admission of the plaintiff's testimony of conversations between himself and his wife after his discovery of her condition, seem to be based on the theory that the declarations of the wife concerning her improper relations with the defendant were incompetent. In *McCall v. Galloway,* 162 N. C., 353, it is said that the excluded testimony was intended to put in evidence the declarations of the wife against her husband. But not so in the present case; the case cited is therefore not an authority for the appellant's position. It was not admitted as evidence for or against the plaintiff on account of criminal conversation between his wife and the defendant; it was competent as tending in part to corroborate Mrs. Hyatt and in part to show the humiliation and suffering endured by the plaintiff in consequence of the defendant's wrong.

The appellant's motion to dismiss the action as in case of nonsuit was properly denied. We do not assent to the proposition that there was no evidence that the wife's affections had been alienated or, excluding the testimony of Mrs. Hyatt, that there was no evidence to justify the answer to the second issue. The evidence was clearly sufficient to sustain the verdict. *Grant v. Mitchell,* 156 N. C., 15, 19; *Powell v. Strickland,* 163 N. C., 394; *Cottle v. Johnson,* 179 N. C., 426.

The appellant has assigned for error several excerpts from the instructions given the jury. We have carefully examined them one by one in their relation to the whole charge, and have not discovered any error entitling the appellant to a new trial. To dwell upon or to outline these instructions would unduly prolong the opinion and would serve no useful purpose. Those not restricted to a recital of the contentions embrace a statement of legal principles which have frequently been approved.

On defendant's appeal we find no error. The plaintiff is entitled to a judgment for the full amount awarded by the jury, both as to compensatory and as to punitive damages.

No error.

JOHN E. PATTON v. CHAMPION FIBRE COMPANY AND W. J. DAMTOFT.

(Filed 21 December, 1927.)

Deeds and Conveyances—Timber—Fraud—Misrepresentation — Damages —Independent Investigation.

Where the purchaser of lands acts upon his own investigation as to the quantity of timber standing thereon, which is a paramount inducement to him to buy, and in consequence thereof he has bought at a less price than they were offered to him, and he has received a deed without warranty as to the quantity of timber, he may not recover from his vendor damages upon the latter's alleged fraudulent representation as to a greater quantity of timber than that actually conveyed, as the purchase was made independent of the alleged fraudulent representations and not in consequence thereof.

APPEAL by plaintiff from *Shaw, J.*, at May Term, 1927, of BUNCOMBE. Affirmed.

Action to recover damages sustained by plaintiff by reason of fraudulent representations made to him by defendants, with respect to the quantity of timber on lands sold and conveyed to plaintiff by defendant, Champion Fibre Company, said fraudulent representations having been made by its codefendant, W. J. Damtoft, its agent and woods superintendent, who acted for said company in making said sale.

From judgment dismissing the action, upon defendants' motion for judgment as of nonsuit, at the close of plaintiff's evidence, plaintiff appealed to the Supreme Court.

Marcus Erwin and Mark W. Brown for plaintiff.
Rollins & Smathers for defendants.

CONNOR, J. Early in December, 1921, negotiations were entered into by and between plaintiff and defendants for the sale to plaintiff by defendants of certain lands situate in Cherokee County, N. C., and owned at the time by defendant, Champion Fibre Company. These negotiations were conducted on behalf of said company by defendant, W. J. Damtoft, its agent and woods superintendent, and were begun and concluded at Asheville, N. C. Plaintiff testified as follows: "I asked him what sort of timber it was. He said he had a statement of the timber on four tracts. He then went to his grip and got out a statement, showing the amount of the land." This statement, offered in evidence by plaintiff, is entitled "Approximate Estimate of Portions of the Dewar Lands." It appears therefrom that there were 5,116,000 board feet of timber, and 6,020 cords of chestnut wood on the McClelland's Creek tract. This statement shows the estimate in feet of the different kinds of timber on said tract. Plaintiff further testified: "He got out this statement and we went over it together, and talked about it. He asked what experience I had had in the lumber business and I told him, about 25 years. He then asked what sort of outfit I had to work with. I told him I had a mill which would cut 10,000 to 15,000 feet a day, and that I had plenty of stock to do the logging and hauling. He said, 'You ought to have the McClelland Creek Boundary.' I told him, 'Yes,' that I would like to get a boundary where I would not have to move so much. We talked about it and went over the figures together. I asked him if he had measured it, and he said 'Yes,' that he had made a tree count and used the Doyle Rule. I asked him if any one else had cruised it. He said 'Yes,' naming several men, including Mr. C. D. Rankin. I asked him how much Mr. Rankin had made it, and he said 6,185,000. I had known Mr. Rankin. His reputation as an estimator was good. I had worked under him for years and his estimates always held up. That made me pretty well satisfied, and willing to look at it. I then asked Mr. Damtoft the price of the timber. He said that he would not sell the timber by itself, but wanted to sell the timber, land and all. I then asked him the price of the timber, land and all, and he said, '$30 per acre.' I decided that as I was out of timber and did not have any work on at the time, I would go and see it. He said he would have a man to meet me and show me the boundary."

Thereafter plaintiff, with his son, who was interested with him in business, went from Asheville to Cherokee County, and accompanied by an employee of the company, who showed him the boundaries of the land, went upon the land, and examined the timber. Plaintiff also made inquiries of lumber men of experience, who knew the land as to the timber. Thereafter, on 21 December, 1921, plaintiff wrote and mailed to defendant, Champion Fibre Company, a letter in which he said:

"I have just got back from looking over your boundary of timber on McClure's Creek. I went over the proposition very carefully, and find that I cannot handle it at the price for this reason. The logging proposition is very rough, also find that one cove of the boundary has the chestnut oak cut, and it has been badly cared for in falling. Most all the good and large trees have split as much as forty feet, which practically ruins them. Also I find fifty acres that has the timber all taken off. I am satisfied that the estimate on the chestnut will fall considerably under. And taking the whole thing in consideration, I feel that $25 an acre would be a good price.

"I have talked with several experienced lumber men who have been on the tract, and have cruised it closely, and some of them think that $20 would be a fair price for the boundary, while not any of them that I have talked with puts the value on it over $25 an acre.

"Please call me over the phone if you decide to take my proposition. Please let me hear from you at once, as I have some other boundaries in view."

Plaintiff thus declined defendants' offer to sell him the land and timber at $30 per acre, for the reasons stated in his letter. His counter proposition, in which no reference is made to the quantity of the timber or to any representations made by defendants with respect thereto, was accepted by defendant, Champion Fibre Company. The said company, thereafter, by deed dated 24 December, 1921, conveyed to plaintiff the land and timber which were the subject-matter of their negotiations begun early in December. The said deed contains no warranty as to the quantity of timber on the land described therein; there was, however, a supplemental agreement, embodied in the deed of trust executed by plaintiff to secure the purchase price of the land and timber, fixing the minimum price of the land and timber at $30,000 and providing that if upon a survey to be made thereafter, the acreage of the land should be found to exceed 1,050 acres, plaintiff should pay for such excess at the rate of $25 per acre. The deed conveyed to plaintiff, not only the land described therein in fee, but also the timber on another tract, containing 150 acres.

There is evidence tending to show that there were only 2,530,190 feet of timber on the land at the time same was conveyed by the Champion Fibre Company to plaintiff, and that defendants knew at said time that the quantity of said timber was much less than 5,166,000 feet, as shown by the statement exhibited to plaintiff by defendant, W. J. Damtoft, at the beginning of the negotiations for the sale of the land to plaintiff.

At the close of plaintiff's evidence, tending to show the facts to be as above stated, defendants moved for judgment as of nonsuit. This motion was allowed, and plaintiff excepted. He also excepted to the judgment dismissing the action, in accordance with defendants' motion. The only assignments of error upon his appeal to this Court are based upon these exceptions.

These assignments of error cannot be sustained. The contract for the purchase of the land and timber by plaintiff, and the conveyance of the same by defendant, Champion Fibre Company, resulted from the offer of plaintiff and the acceptance by said defendant. It appears affirmatively by plaintiff's testimony that he was not induced to make his offer by any representations theretofore made by defendant, W. J. Damtoft, with respect to the quantity of timber which he proposed to sell to plaintiff. Plaintiff did not rely upon the representations which he testifies were made by Damtoft, but upon his own knowledge, and upon information which he secured by independent investigations. He declined the offer made by defendants at the time the representations were made. The subsequent contract, pursuant to which the conveyance was made, was not induced by such representations, and differed in material respects from the contract which defendants offered to make.

It is well settled that one cannot secure redress for fraud where he acted in reliance upon his own knowledge or judgment based upon independent investigation. This rule is said to be especially applicable where the representee's investigation was undertaken at the suggestion of the representor. 26 C. J., p. 1162, sec. 75. Plaintiff did not accept defendants' offer, made at Asheville, to sell him the land and timber, situate in Cherokee County, at $30 per acre. He was unwilling to buy the land and timber upon Mr. Damtoft's statement as to his estimate of the quantity of the timber, or as to the estimate made by Mr. Rankin. He relied upon these statements only as inducements to go to see the land and timber, himself, and to make independent investigations. He testifies that after these statements were made to him by Mr. Damtoft, he decided to go to see the land and timber. This he did, with the result that he declined the offer for the reasons stated in his letter. In making his offer to purchase the land and timber at $25 per acre, he informed defendant, Champion Fibre Company, that he had been over the proposition carefully and had consulted with experienced lumber men, who had been on the land, and investigated the timber. His offer is based upon his own independent investigations, and upon information derived from sources other than Mr. Damtoft; he did not rely upon statements made to him by Mr. Damtoft, at the time the offer was made to him, which he subsequently declined.

There was no error in allowing the motion for judgment as of nonsuit, or in dismissing the action pursuant to said motion.

Affirmed.

W. I. HALL ET AL. v. COMMISSIONERS OF DUPLIN COUNTY ET AL.

(Filed 21 December, 1927.)

1. **Schools—Taxation—Bonds—Elections—Statutes — Constitutional Law —County Finance Act.**

   When required for the establishment or maintenance of a six-months term of the State system of public schools, in accordance with the provisions of the State Constitution, it is not necessary that the question of issuing bonds by a county therefor be first submitted to the voters for the validity of the bonds, under the provisions of the County Finance Act. Const., Art. VII, sec. 7.

2. Same — Government — Principal and Agent — Appeal and Error — Material Facts—Remand.

Where a county proposes to issue bonds for the erection and maintenance of its public schools under the provisions of the County Finance Act, without submitting the question to its voters, it must be shown that the county was acting as the administrative agent of the State in providing a State system of public schools, and that the erection and purchase of the schoolhouses contemplated is necessary for a six-months school term in the county, and where on appeal the record does not disclose such findings, the case will be remanded.

CIVIL ACTION, before *Cranmer, J.*, at October Term, 1927, of DUPLIN.

On 18 July, 1927, the board of commissioners of Duplin County passed the following resolution:

"1. That bonds of Duplin County shall be issued for the purpose of the erection or purchase of schoolhouses in the maximum aggregate principal amount of $140,000.00.

"2. That a tax sufficient to pay the principal and interest of the bonds when due shall be annually levied and collected.

"3. That a statement of the county debt has been filed with the clerk and is open to public inspection.

"4. That this order shall take effect thirty days after the first publication thereof after final passage, unless in the meantime a petition for its submission to the voters is filed under the County Finance Act, and in such event it shall take effect when approved by the voters of the county at an election as provided in the said act.

"The foregoing order has been introduced and a sworn statement has been filed under the County Finance Act showing the assessed valuation of the county to be $25,481,292.00, and the net debt for school purposes, including the proposed bonds, to be $374,595.87. A tax will be levied for the payment of the proposed bonds and interest, if the same shall be issued. Any citizen or taxpayer may protest against the issuance of such bonds at a meeting of the board of commissioners to be held at ten o'clock, a. m., 18 July, 1927, or an adjournment thereof."

On said date protests were made by certain citizens and taxpayers of the county, which protests were overruled by the board of commissioners and the foregoing resolution was first published on 21 July, 1927. The publication of the resolution provided: "Any action or proceeding questioning the validity of said order must be commenced within thirty days after its first publication." Thereafter, on 19 August, 1927, a petition purporting to be signed by 900 citizens and voters of Duplin County was submitted to the board, requesting that said resolution be submitted to the qualified voters of Duplin County as required by section 21, chapter 81, Public Laws 1927, same being known as the County Finance

Act. Thereupon, on 14 September, 1927, the board of commissioners, after examining said petition and finding that said petition was insufficient and did not contain fifteen per cent of the total number of votes cast at the last preceding election for the office of governor, dismissed the petition.

The cause came on for hearing before E. H. Cranmer, judge presiding, on 13 October, 1927, and the following judgment was rendered:

"This cause coming on to be heard and being heard before the undersigned at the courthouse in Jacksonville, North Carolina, on 13 October, 1927, upon a notice issued to the defendants to show cause why a restraining order should not be issued against them restraining them from issuing and selling the bonds described in the complaint, the plaintiffs being represented by O. B. Turner and H. E. Faison, and the defendants being represented by Gavin and Boney, and L. A. Beasley, after the complaint and answer was read and the argument of counsel:

It is thereupon considered and adjudged that the plaintiffs are not entitled to the restraining order asked for, and that the motion for said restraining order is denied.

It is further considered and adjudged upon the pleadings that the plaintiffs are not entitled to recover and that the action is dismissed at the costs of the plaintiffs to be taxed by the clerk."

Oscar B. Turner for plaintiffs.
G. E. Boney, L. A. Beasley and H. L. Stevens for defendant.

BROGDEN, J. The main question presented by the appeal is whether or not Duplin County has authority under the law to issue bonds for the "erection and purchase of schoolhouses" as specified by chapter 81, Public Laws 1927, sec. 8, subsec. (a). The identical question was considered by this Court in *Frazier v. Comrs., ante,* p. 49. *Justice Connor,* writing for the Court, declares the law thus: "The counties of the State are authorized by this statute to issue bonds and notes for the erection of schoolhouses and for the purchase of land necessary for school purposes, and to levy taxes for the payment of the same, principal and interest, not as municipal corporations, organized primarily for purposes of local government, but as administrative agencies of the State, employed by the General Assembly to discharge the duty imposed upon it by the Constitution to provide a State system of public schools. The limitations of Article VII, sec. 7, are not applicable to bonds or notes issued by a county, as an administrative agency of the State, under authority conferred by the County Finance Act, for the purpose of erecting schoolhouses, and equipping same, or purchasing land necessary for school purposes. We therefore hold that the board of commissioners of any county in the State, upon compliance with the provisions of the County Finance Act, has authority and is empowered to issue bonds or notes of the county for the purpose of erecting and equipping schoolhouses, and purchasing land necessary for school purposes, and to levy taxes for the payment of said bonds or notes, with interest on the same, without submitting the question as to whether said bonds or notes shall be issued or said taxes levied, in the first instance, to the voters of the county, where such schoolhouses are required for the establishment or maintenance of the State system of public schools in accordance with the provisions of the Constitution."

There is no finding of fact as to whether or not in issuing said bonds Duplin County was acting as an administrative agent of the State in providing a State system of public schools, or as to whether the "erection and purchase of schoolhouses" is necessary to provide a six months school term in said county. Under the decisions of this Court, applicable to the question in controversy, these facts are essential to the validity of bonds issued for such school purposes without the approval of the voters. The trial judge made no findings of fact and an inspection of the record does not disclose the necessary and essential facts, and for this reason the cause is remanded to the Superior Court of Duplin County for further proceedings in accordance with this opinion.

Remanded.

J. H. YOUNG ET AL. v. COMMISSIONERS OF ROWAN COUNTY AND BOARD OF EDUCATION OF ROWAN COUNTY.

(Filed 21 December, 1927.)

1. Schools—Taxation—Petition of Voters—Statutes—Bonds.

As affecting the validity of bonds involving the levy of a tax for school purposes by a special school district, in accordance with 3 C. S., 5639, it is necessary that a petition be filed in substantial compliance with the terms of the statute.

2. Same—Petition of Voters Not a Prerequisite.

The provisions of 3 C. S., 5669, that the election shall be called and held under the same rules and regulations as provided in Public Laws of 1923, subchapter 8, for local tax elections, means that the election shall be authorized and conducted in accordance with the rules and regulations prescribed in subchapter 8, and does not include within its meaning the signing of the petition by the voters as required by 3 C. S., 5639.

3. **Statutes — Interpretation — In Pari Materia — Schools — Taxation — Bonds.**

3 C. S., 5669 and 5639, relating to the issuance of bonds for local school districts, the latter requiring the filing of a petition by the voters, are *in pari materia,* and should be construed together. See, also, C. S., 5641, 5663, 5664, 5647.

CIVIL ACTION, before *Schenck, J.,* at June Term, 1927, of ROWAN.

The plaintiff, a resident and taxpayer of Providence Special School Tax District No. 1 of Rowan County, instituted an action against the board of county commissioners and the board of education of said county, asking that said boards be enjoined from issuing or selling school bonds in the sum of $20,000.00.

The facts essential to the determination of the rights of the parties appear in the judgment which is as follows: "This cause coming on to be heard upon a motion by the plaintiff for a temporary restraining order, and being heard, and the complaint of the plaintiffs being read, the court finds the following facts:

That Providence Special School Tax District No. 1 is situated in Rowan County, State of North Carolina. That on 7 March, 1927, at a regular meeting of the board of county commissioners of Rowan County an order was made calling an election in Special School Tax District No. 1 in Rowan County 'for the purpose of voting upon the question of issuing $20,000 of bonds and levying a sufficient tax for the payment thereof, for the purpose of erecting, enlarging, altering and equipping school buildings and purchasing school sites in said special tax district, or for any one or more of said purposes.'

That the petition upon which the said election was called and held was signed by the board of education of Rowan County, the said petition being a copy of the one attached to the complaint of the plaintiff.

That the notice of the said election and the registration, together with the boundaries, was published in the newspaper as required by law.

That the said election was regularly held in said district on Tuesday, 26 April, 1927, and a majority of the qualified voters of the said district favored the question presented to them. That at the time of the election two schools in the said district were maintained, one of which was a union school.

That the said election was called and held under and by virtue of 3 C. S., 5669.

That there was no petition signed by 25 qualified voters of the district or by any other voters in the district.

Upon these facts found, the court, being of the opinion that the petitioners are not entitled to a temporary restraining order, refused to grant such order prayed for, and orders the petition filed dismissed."

From the foregoing judgment the plaintiffs appealed.

Walser & Walser for plaintiff.
Craige & Craige for Board of Commissioners.
T. G. Furr for Board of Education.

BROGDEN, J. Is a special election for issuing bonds by a special school tax district for the purpose of acquiring, erecting and enlarging school buildings and purchasing school sites governed by 3 C. S., 5639 or 3 C. S., 5669?

If 3 C. S., 5639 applies, the election was invalid, because no petition was signed by qualified voters as specified therein. Upon its face, 3 C. S., 5639 applies to the levying of a local tax in the particular district, specified in the petition. In all elections, involving the levying of a local tax in a particular district "it is recognized that the petition in a matter of this kind is jurisdictional, and the requirements concerning it must be substantially complied with." *Wilson v. Comrs.,* 183 N. C., 638. In the *Wilson case, supra,* an election was held for issuing bonds, but it must be observed that this election was held under Public-Local Laws 1915, chapter 722, which required a petition to be signed by "one-fourth of the voters within any school district and approved by the county board of education," etc. In *Gill v. Comrs.,* 160 N. C., 176, an action was brought to test the validity of an election held in Wake Forest for the purpose of levying a special tax. Referring to the validity of the petition of freeholders filed, the Court said: "The jurisdiction, if we may so term it, of the board of education and the county commissioners is dependent upon the presentation to them of such a petition as is required by the statute, it being a condition precedent to the exercise of the particular authority conferred by the statute upon them. It was the foundation upon which all else rested, and without which the subsequent proceedings cannot stand."

The petition in the case at bar requested an election upon the question of issuing bonds for a special school taxing district in which a union school was maintained. This petition was filed by the county board of education by authority of 3 C. S., 5669. Both of the sections in controversy were brought forward in the codification of the school law as will appear in Public Laws 1923, chapter 136, and therefore should be construed together. The petitioners contend that the words in 3 C. S., 5669, "said election shall be called and held under the same rules and regulations as provided in subchapter 8 for 'local tax elections for schools,'" mean that the election cannot be held without a petition signed by one-fourth of the qualified voters. We do not concur in this construction of the statutes. The language referred to apparently means that the election shall be authorized and conducted in accordance with the rules and regulations prescribed in subchapter 8. Subchapter 8, beginning with section 5641, prescribes certain rules and regulations to be observed in holding the election. In other words, we are of the opinion that the machinery for holding special elections is prescribed in subchapter 8, and that this same machinery is to be used as stated in C. S., 5641, "in all elections held under this law." For instance, 3 C. S., 5663, provides for an election upon a petition of the county board of education for a special county tax, and yet, 3 C. S., 5664, prescribes that such election shall be held under the "Rules Governing Elections for Local Taxes as provided in this law." Again, 3 C. S., 5647 provides for a petition for submitting the question of revoking a special tax and abolishing the district, "to be held under the provisions prescribed in this act for holding other elections." No petition signed by twenty-five qualified voters is required in these instances although the election must be held in compliance with the machinery set up for voting special taxes. If, therefore, the contentions of the petitioners were established, irreconcilable conflicts and inconsistencies would result. Various phases of special tax elections have been considered by this Court in the following cases: *Howell v. Howell,* 151 N. C., 575; *Gill v. Comrs.,* 160 N. C., 176; *Key v. Board of Education,* 170 N. C., 123; *Wilson v. Comrs.,* 183 N. C., 638; *Plott v. Comrs.,* 187 N. C., 127; *Sparkman v. Comrs.,* 187 N. C., 244; *Causey v. Guilford County,* 192 N. C., 298; *Flake v. Comrs.,* 192 N. C., 590.

The plaintiffs rely upon *Plott v. Comrs., supra.* It appears, however, in that case that an election was called "to determine whether a special tax should be levied to supplement the school funds and whether bonds should be issued for the purpose of acquiring sites and improving and erecting school buildings." By reason of the fact that an election was called to levy a special tax as well as to issue bonds, it was necessary that the petition be signed by freeholders in accordance with 3 C. S., 5639.

Upon the authorities we hold that a petition for issuing bonds for the purpose of acquiring, erecting, enlarging, altering and equipping school buildings and purchasing sites, and where no special tax is to be levied "to supplement the funds," that a petition filed in accordance with 3 C. S., 5659 is valid and sufficient. There is a suggestion as to whether or not a union school was maintained in the district, but it appears that the trial judge found that a union school was maintained in the district.

Affirmed.

W. B. CASE v. EWBANKS, EWBANKS & COMPANY.

(Filed 21 December, 1927.)

1. **Insurance — Fire Insurance — Principal and Agent — Contracts — Damages.**

Where the general agent of a fire insurance company for a limited territory, through the negligence of an employee, fails to write into the policy a statement required to make it valid, the agents are liable in damages to the insured for loss by fire, in an action based solely on that ground, and not upon the invalid contract of insurance negligently issued by them.

2. **Same—Court's Jurisdiction—Federal Courts—Election of Remedies—Estoppel.**

Where a nonresident defendant fire insurance company has upon petition removed a cause from the State to the Federal Court upon a policy of insurance that was void in that jurisdiction, but not in the jurisdiction of the courts of this State, and the Federal Court has adjudicated that the plaintiff could not recover under the contract for a loss by fire, the plaintiff may thereafter bring action in the State court against the agents and recover damages from them occasioned by their own neglect in not inserting a provision in the policy that would have rendered it valid, the subject-matter of the latter action being based upon negligence and not on the policy contract, and the application of the doctrine of the election of remedies has no force.

3. **Same.**

The law upon which the principle of the election of remedies does not apply under the facts of this case, is not affected by the fact that in the action in the Federal Court the plaintiff recovered damages under the fire insurance contract for the loss of his furniture, but was denied recovery because in the court of Federal jurisdiction the policy sued on was void as to real property.

APPEAL by defendants from *Moore, J.*, at August Special Term, 1927, of HENDERSON. No error.

Action to recover damages for breach of contract by which defendant, as insurance agents and brokers, agreed to procure for and to issue to plaintiffs a policy of insurance, insuring him against loss or damage, by fire, on a building owned by plaintiff.

From judgment on the verdict sustaining the allegations of the complaint, defendants appealed to the Supreme Court.

O. F. V. Blythe and Shipman & Justice for plaintiff.

Ewbanks, Whitmire & Weeks, John M. Robinson and McD. Ray for defendants.

CONNOR, J. On 24 August, 1923, plaintiff was the owner of a building located on a lot in the town of Hendersonville, N. C. The lot on which the said building was located was owned in fee simple by Dr. J. S. Brown. A few days prior to said date, at a public sale conducted for the owner of said lot and building, Mrs. M. C. Dotson, plaintiff had purchased the building, and Dr. Brown had purchased the lot. The building had been used for many years as a hotel or boarding house. There was evidence tending to show that said building was worth from $8,000 to $9,000. At the time plaintiff bought the building he also purchased from Mrs. Dotson the furniture contained therein. Plaintiff, who had occupied the building prior to said sale, under a lease from Mrs. Dotson, and used same as a hotel or boarding house, continued to use the same for such purpose until it was destroyed by fire in December, 1923.

Prior to the sale of the lot to Dr. Brown, and of the building to plaintiff defendants, as insurance agents had issued to Mrs. Dotson, the owner of the building and lot, a policy of fire insurance on the building in the sum of $5,000. After the sale defendants, who were fully informed that plaintiff had become the owner of the building and that Dr. Brown had become the owner in fee simple of the lot on which the building was located, agreed with plaintiff to procure for and to issue to him a policy of fire insurance on said building in the sum of $5,000, and on the furniture contained therein in the sum of $1,000. At the time of this agreement defendants advised plaintiff that as he was not the owner in fee simple of the lot on which the building was located, he would be required to procure a lease from Dr. Brown for the lot, in order that the policy should be valid. In accordance with this advice plaintiff procured a lease for the lot for twelve months from Dr. Brown, and so notified defendants, who thereupon informed plaintiff that they had procured for and had issued to him a valid policy in accordance with their agreement. Plaintiff then paid to defendants the sum of $68.70, as the premium for said policy. Defendants did not deliver the policy to plaintiff at this time, but in accordance with their offer, which was accepted by plaintiff, retained it in their possession for plaintiff. For this reason plaintiff did not read the policy, or hear it read, prior to the destruction of the building and furniture by fire. He relied upon defendants' assurance, when he paid the premium, that they had issued to him a valid policy. Before the expiration of said policy, in December, 1923, the said building and its contents, without any fault or want of care on the part of plaintiff, was completely destroyed by fire.

After the destruction of the building and its contents by fire, plaintiff called on defendants for his policy of insurance, in order to make a claim thereunder for his loss. Defendants then delivered to plaintiff a policy of insurance, dated 24 August, 1923, issued by defendants as agents for the Northern Assurance Company, Limited, of London, in form sufficient to insure plaintiff against loss or damage by fire, on his building in the sum of $5,000, and on the furniture contained therein in the sum of $1,000. It was stipulated, however, in said policy that same was void if plaintiff was not at the time of its issuance the owner in fee simple of the land on which the building was located, and that such stipulation was not waived, unless such waiver was in writing attached to the policy. The policy was in the form prescribed by statute. C. S., 6437.

The policy delivered by defendants to plaintiff did not contain a waiver of the stipulation with reference to the title of plaintiff to the land on which the building was located. No clause was inserted therein or attached thereto containing such waiver. The company denied liability under the policy for loss on either the building or the furniture, for that plaintiff was not at the date of its issuance the owner in fee simple of the land on which the building was located. It contended that the policy was void both as to the building and as to the furniture.

Notwithstanding the absence from the policy of a clause showing that plaintiff's title to the land was that of a lessee, and not that of an owner in fee simple, and notwithstanding the company's denial of liability under the policy for this reason, plaintiff commenced an action in the Superior Court of Henderson County against the company to recover on the policy. This action, in which the amount involved was over $3,000, upon the petition of the company, a nonresident of the State of North Carolina, and sole defendant therein, was removed from the State court to the District Court of the United States for the Western District of North Carolina for trial, under the provision of the act of Congress. The action was thereafter tried in said District Court at Asheville, N. C. The said trial resulted in a judgment that plaintiff recover of the company the sum of $1,000 and interest on account of the loss by fire of his furniture, and that he recover nothing on account of the loss of his building by fire. It was held in said District Court that the policy with respect to the building was void, because of the violation of the stipulation relative to plaintiff's title to the land, but that said policy was valid with respect to the furniture, for that said stipulation had reference to the building but not to the furniture. Upon advice of counsel that said judgment was in accordance with the law as held in the Federal Courts upon the facts as contended by plaintiff, and as found by the jury, plaintiff did not perfect his appeal from said judgment to the Circuit Court of Appeals for the Fourth Circuit. The judgment was affirmed by said Court of Appeals upon the appeal of the company. 12 F. (2d), 551. Plaintiff has received from the company the amount due on the judgment rendered in the District Court of the United States, and said judgment has been fully satisfied.

Plaintiff thereafter commenced this action in the Superior Court of Henderson County to recover of defendants, as insurance brokers and agents, damages for their negligent failure to procure for and to issue to him a policy of insurance, insuring plaintiff against loss or damage by fire on his building, in accordance with their contract and agreement with him. The issues submitted to the jury were answered in accordance with the contentions of plaintiff, and from the judgment in accordance with the verdict, defendants have appealed to this Court.

The evidence offered at the trial tends to establish the facts as above stated. Indeed, the material facts upon which plaintiff contends that defendants are liable to him in this action are not controverted. Defendants admit, both in their answer to the complaint and by the testimony offered in evidence in their behalf, that a clerk in their office inadvertently failed to insert in the policy, or to attach thereto a clause showing that plaintiff was not the owner in fee simple, but was lessee of the land on which the building was located at the time the policy was issued. They also admit that they knew at said time that plaintiff was not the owner in fee simple of the land. F. A. Ewbank, one of the defendants, testified as follows: "I was the agent for the Northern Assurance Company, Limited, of London, when I wrote this policy. The only transaction I had with Mr. Case was when he came into my office and stated that he had bought this house, and that Dr. Brown had bought the land. I stated to him that it would be necessary for him to have a lease, and he said that he had made arrangements with Dr. Brown; that he had a lease from him for twelve months. The reason that we did not get the clause in the policy was the failure of the stenographer who wrote the policy to put it in. It was our full intention to get the lease statement in the policy, but we failed to do it. The clause was left out inadvertently."

Defendants, by their motion for judgment as of nonsuit, first made at the close of plaintiff's evidence, and renewed at the close of all the evidence, presented to the court below their contention that plaintiff is not entitled to recover of defendants in this action because, with full knowledge of all the facts affecting the validity of the policy, he had after the loss occurred sought to hold the company liable under said policy in the action which was removed to and tried in the United States District Court. By their assignment of error based on their exception to the refusal of the court to allow their motion at the close of all the evidence, they now present to this Court, upon their appeal from the judgment rendered on the verdict, their contention that there was error in such refusal.

The right of plaintiff to maintain this action in the first instance against defendants is fully supported by *Elam v. Realty Co.,* 182 N. C., 599, 109 S. E., 632, 18 A. L. R., 1210. In his opinion in that case *Hoke, J.,* says: "It is very generally held that where an insurance agent or broker undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he has assumed, and within the amount of the proposed policy he may be held liable for the loss properly attributable to his negligent default." In the instant case there was evidence to sustain the findings of the jury that defendants negligently failed to insert in the policy a clause showing that plaintiff was lessee and not owner in fee of the lot on which the building was located at the date of the issuance of the policy and that plaintiff is entitled to recover of defendants as damages the sum of $5,000. Defendants rely principally upon their contention that plaintiff, having with full knowledge of all the facts affecting the validity of the policy, elected to sue the company, upon the contention that the policy was valid and enforceable against the company, cannot now maintain this action against defendants, as agents for the company, upon the contention that it was void.

Plaintiff, however, is not seeking to recover of defendants in this action upon the same cause of action as that upon which he sought to recover of the company. He sued the company upon the allegation that the policy issued to him by its agents was valid, when it was adjudged by a court of competent jurisdiction that the policy was void, with respect to the building, he sued the defendants upon the allegation that they had negligently failed to procure for and to issue to him a valid policy of insurance on said building in accordance with their agreement. The doctrine with respect to election between inconsistent remedies has no application upon the facts of this case. This doctrine is founded upon the principle stated in *Rounsaville v. Ins. Co.,* 138 N. C., 191, as follows: "The general principle is that when a person contracts with another who is in fact an agent for an undisclosed principal, he may, upon discovery of the principal, resort to him or to the agent with whom he dealt, at his election. When, however, he comes to a knowledge of the facts and elects to hold the agent, he cannot afterwards have recourse to the principal." Plaintiff is not seeking to hold defendants liable on a contract to insure his building; he seeks to recover of them damages for breach of contract to procure for and to issue to him a valid policy. There is no contention by plaintiff that defendants are liable to him on a contract of insurance; he contends that they are liable for negligent failure to procure for and to issue to him such contract.

If the plaintiff's action against the company had been tried in the Superior Court of Henderson County, instead of in the District Court of the United States, the policy of insurance, upon the admitted facts, would have been held valid, for it is held in the courts of this State that the provisions in a policy of insurance which restrict the agent's power of waiver, do not as a rule apply to an agent who has knowledge of the conditions existing at the inception of the contract. These conditions, it is held by us, may be waived by the agent although embraced in the policy when it is delivered, for in these circumstances the agent's knowledge is the knowledge of the principal. *Aldridge v. Ins. Co., ante,* 683; *Smith v. Ins. Co.,* 193 N. C., 446; *Bullard v. Ins. Co.,* 189 N. C., 34; *Ins. Co. v. Lumber Co.,* 186 N. C., 269; *Johnson v. Ins. Co.,* 172 N. C., 142. It is held otherwise in the Federal Courts. *Northern Assurance Co., Ltd., of London v. Case,* 12 F. (2d), 551. In his opinion in that case *Parker, Circuit Judge,* says: "In the Federal Courts it is well settled that where, as in this case, the policy provides that no officer or agent shall have power to waive any of its terms, except by written endorsement, mere knowledge on the part of the agent issuing the policy does not waive breach of the conditions therein contained." Plaintiff could not have maintained this action against defendants if the policy delivered to him by them had not been adjudged invalid with respect to the building by a court having jurisdiction of the action brought by plaintiff against the company. His cause of action against defendants, as stated in his complaint, for damages, arose only upon such adjudication, and he was, therefore, not put to an election, prior to the rendition of the judgment in the action which was removed to and tried in the Federal Court, as to whether he would sue the company as principal or the defendants as agents.

Furthermore, although the company denied liability under the policy for plaintiff's loss by the destruction of both his building and his furniture, upon its contention that it was void as to both, it was held in the Federal Court that the policy, while void as to the building, was valid as to the furniture. Judgment was therefore rendered that plaintiff recover of the company on the policy for the loss by fire of his furniture. The judgment in that respect is supported by authoritative decisions of the Federal Court. *Downey v. German Alliance Ins. Co.* (C. C. A., 4th), 252 Fed., 701. It would have been held otherwise by the courts of this State, upon the authority of *Coggins v. Ins. Co.,* 144 N. C., 8. See *Mortt v. Ins. Co.,* 192 N. C., 8, in which *Coggins v. Ins.*

Co. is followed as an authority. It cannot be held that plaintiff is estopped from maintaining this action against defendants, upon the principle of election of remedies by his action against the company in which he recovered judgment upon the policy against the company upon the holding that the policy was valid with respect to the furniture.

We find no error in the refusal of defendants' motion for judgment as of nonsuit. We have considered the other assignments of error based upon exceptions appearing in the case on appeal. They cannot be sustained. Upon the facts admitted in the pleadings, and found by the jury, as appears from their answers to the material issues submitted by the court, defendants are liable to plaintiff in this action and the judgment is affirmed.

No error.

SOUTHERN RAILWAY COMPANY v. CHEROKEE COUNTY.

(Filed 21 December, 1927.)

Taxation—Constitutional Law—Statutes—Curative Acts.

Where a county has levied a tax for general county purposes in excess of that permitted by our Constitution, Art. V, sec. 6, which a property owner has paid under protest, and has reserved his right under the provisions of C. S., 7979, it may not be validated by an act passed after the assessment had been passed upon or levied under the former statute.

APPEAL by defendant from *Sink, Special Judge,* at June Term, 1927, of CHEROKEE. Affirmed.

Action for the recovery of taxes paid under written protest. C. S., 7979. The taxes paid by the plaintiff in Cherokee County for the year 1925 amounted to $52,632.02; of this amount $6,292.39 was paid under protest for the alleged reason that it had been illegally assessed. After demand duly made in compliance with the statute the plaintiff brought suit to recover the alleged illegal tax; a trial by jury was waived by the parties and the cause was submitted to the presiding judge upon the following agreed facts:

"It is agreed that the Southern Railway Company is a corporation and a common carrier, and owned property in Cherokee County in the year 1925, subject to taxation, of the value of $2,097,464; and that the defendant, Cherokee County, is a *quasi*-public corporation, and that it levied a general county tax of 45 cents on the $100 valuation of property for the year 1925; that the total tax levied against the property of the plaintiff was $52,632.02 for the year 1925, in Cherokee County; that all of said tax was paid by the plaintiff before the institution of this suit, and that the sum of $6,292.39 was paid under written protest on 25 January, 1926; that the plaintiff, on 5 February, 1926, made written demand for refund of said sum of $6,292.39, upon the proper authority, as required by law; that $9,438.59 was the amount of taxes levied against the property of the plaintiff for general county purposes for the year 1925, based upon the levy of 45 cents per $100 valuation levied and collected by the defendant out of the plaintiff; that $6,292.39, with interest from 5 February, 1926, is the amount in controversy and dispute in this action, and that said amount represents the levy of 30 cents (of the 45 cents) levied and collected by the defendant out of the plaintiff for general county purposes for the year 1925; that the General Assembly of North Carolina, at its session, 1927, passed an act attempting to validate and make legal that part of the tax levied and collected for general county purposes in excess of the constitutional limitation; that a copy of said act is correctly set forth in answer of the defendant, and by consent is made a part of the findings of fact; that this action was instituted in the Superior Court of Cherokee County on 18 April, 1927.

"And it is further agreed that the sole question involved in this litigation is whether or not the levy of 45 cents for general county purposes was valid and whether or not the act of the General Assembly, 1927, validated and legalized the levy of the defendant for general county purposes for the year 1925, amounting to 45 cents on the $100 valuation of the property, which said levy was in excess of the constitutional limitation of 15 cents on the $100 valuation of property to the extent of 30 cents on the $100 valuation of property; and if the court is of the opinion that said act of the General Assembly of 1927, validated and legalized said levy of 45 cents on the $100 valuation for general county purposes, then the court may enter such judgment as in his opinion the foregoing facts warrant, with the right of appeal to Supreme Court reserved to losing party."

Thomas S. Rollins and Julius C. Martin for plaintiff.
J. H. McCall and D. Witherspoon for defendant.

ADAMS, J. The Constitution, Article V, section 6, provides: "The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: *Provided,* this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by article nine, section three, of the Constitution: *Provided* *further,* the State tax shall not exceed five cents on the one hundred dollars value of property." It is admitted that for the year 1925 the defendant levied a tax of forty-five cents for general county purposes on property valued at one hundred dollars. The two questions for decision are these: (1) Was the levy of forty-five cents invalid? (2) If so, was the invalidity cured by the act of 1927?

With respect to the first question it is apparent that as the levy exceeded the limitation of fifteen cents the excess of thirty cents was imposed in disregard of the constitutional prohibition and was therefore invalid. It was so held in *R. R. v. Reid,* 187 N. C., 320, in which a tax of three cents had been levied to supplement the general county fund. The appellant practically yields its objection to this position but contends that the defect has been cured by an act of the Legislature. The act, ratified on 28 February, 1927, is set out in the record. The preamble recites the levy of taxes "for special county purposes in excess of the constitutional limitation" and the existence of doubt as to the legality of "said special taxes." The first section of the act is as follows: "That the tax levies for the county of Cherokee for the years one thousand nine hundred and twenty-five and one thousand nine hundred and twenty-six, as resolved by the board of county commissioners on 6 July, 1925, and on the first Monday in July, one thousand nine hundred and twenty-six, respectively, be in their entirety validated and legalized, notwithstanding the failure of the county commissioners to comply with certain provisions of the Constitution and acts of the General Assembly of North Carolina, and notwithstanding any other defect or ground of invalidity whatsoever." Public-Local Laws, 1927, ch. 201. It will be noted that the section purports to validate a levy of taxes which was expressly forbidden by the Constitution. It is not necessary to cite authority in support of the fundamental principle that the organic law is supreme, and that an act which purports to supersede its provisions cannot be enforced. The appellant invokes the principle that a retrospective law curing defects or confirming the exercise of power is valid in those cases in which the Legislature originally had authority to confer the power or to authorize the act. *Edwards v. Comrs.,* 183 N. C., 58. The principle is not applicable to the facts of this case. The county commissioners in levying taxes for 1925 exceeded the constitutional limitation and the Leglislature cannot validate an act which the Constitution forbids. In *R. R. v. Reid, supra,* there was evidence that the commissioners levied fifteen cents for general county purposes and three cents for a special purpose and that the clerk added the two items and entered them as one item for convenience in computation. The plaintiff contended otherwise, and the cause was remanded that the facts might be ascertained. But in the case before us the minutes of the board of commissioners show conclusively that for general county purposes a tax of forty-five cents was levied; they have never been corrected because there is nothing to correct; they stand as originally recorded, and the prohibited levy remains. *R. R. v. Forbes,* 188 N. C., 151. No efficacy can be given to any provision of the legislative act which contradicts the unimpeached record of the county board; for the power to make laws is entirely distinct from the power to find facts. Judgment

Affirmed.

KEITH BROTHERS v. HOYT KENNEDY.

(Filed 21 December, 1927.)

1. **Fraud—Statute of Frauds—Contracts.**

The statute of frauds requiring contracts for the sale of lands to be in writing, applies to executory contracts, and not to those that have been executed. C. S., 988.

2. **Same—Executory Contracts—Executed Contracts—Deeds and Conveyances—Statutes.**

Where the contract between the plaintiff and defendant was for the sale of an automobile by the latter in consideration of which the defendant was to convey certain realty to the former, and receive two hundred and fifty dollars as the excess after paying the purchase price of the automobile, the title to the land subject to investigation by the plaintiff's attorney, and the defendant has accordingly executed a good and sufficient deed and the title is clear and unencumbered: *Held,* the contract is executed as to the conveyance of lands under the statute of frauds, C. S., 988, and the statute being inapplicable the defendant is entitled to recover upon his cross-action.

3. **Appeal and Error—Objections and Exceptions—Evidence—Harmless Error.**

The introduction of evidence on the trial of the action, without objection, cures the erroneous previous admission of the same evidence.

4. **Instructions—Requests for Instructions—Appeal and Error.**

Where greater particularity is desired by a party, he should request special instructions, when the charge construed as a whole sufficiently informs the jury as to the law applicable, under the evidence in the case.

APPEAL by plaintiffs from *Bond, J.,* and a jury, at June Term, 1927, of BRUNSWICK. No error.

This is a civil action brought by plaintiffs against defendant in which a claim and delivery was issued to recover a Dodge touring car valued at $750, and damages.

The plaintiff alleges "that on or about the 12th (18th) day of January, 1926, the defendant fraudulently induced these plaintiffs to permit him to have temporary custody of a certain Dodge touring car, the property of these plaintiffs, for the purpose of showing the same to a party who desired to purchase the said car, the said defendant agreeing to bring said car back to these plaintiffs in a very short time, but despite the demands of these plaintiffs, the said defendant has utterly and completely failed to return the said car to these plaintiffs after possession of the same has been demanded by the plaintiffs, and the defendant therefore is wrongfully retaining the same."

Defendant denies the allegations of plaintiffs, and as a further defense and cross-action, complains in part: "That a few days prior to the 18th of January, 1926, the plaintiffs and the defendant began negotiations relative to the plaintiffs buying certain land belonging to the defendant, H. O. Peterson, the plaintiffs being made aware of the ownership of said lands, which said lands were in Pender County; and as a part of the purchase price the defendants were to receive the said automobile set out and described in plaintiffs' complaint. That in consequence of said negotiations and previous agreement, and in consummation thereon, on 18 January, 1926, the defendant, Hoyt Kennedy and his wife, and H. O. Peterson and his wife, executed to the plaintiffs a good and sufficient deed, conveying said lands and premises referred to in paragraph one hereof to the plaintiffs; and that on 19 January, 1926, this defendant delivered said deed to the plaintiffs at their place of business in the city of Wilmington, North Carolina, which said deed is filed with the court in the above-entitled cause; that at the time the defendant delivered said deed to the plaintiffs, the plaintiff delivered to the defendant the said automobile, which said automobile was the full amount of the purchase price of said lands, except the sum of two hundred and fifty dollars, which said sum of two hundred and fifty dollars was to be paid to the defendant upon the approval of the title to said lands by the plaintiffs' attorneys. . . . That the title to said lands was good. . . . That upon the delivery of said deed, as aforesaid, the negotiations between the plaintiffs and the defendant became an executed contract, it being understood and agreed at said time that in the event the said attorney should find any judgments or mortgages or taxes against said land, that the plaintiff could pay and deduct such amount from the balance of the purchase price of $250, . . . and that this defendant, and his codefendant are now, and have been at all times, able, ready and willing to carry out their part of said contract, as they did do when they delivered said deed; that H. O. Peterson is a necessary party to this action and this defendant asks that the said H. O. Peterson be made a party defendant." "Wherefore, the defendant prays that the plaintiffs recover nothing by their suit and that the defendant recover of the plaintiffs the sum of $250, the additional amount of the purchase price unpaid; that he recover of the plaintiffs the further sum of $750, the value of said automobile, together with damages."

The allegations of the complaint in the further defense and cross-action were denied by plaintiffs and the plea of the statute of frauds set up as a defense.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the parties agree to the trade for said land as alleged in cross-action? Answer: Yes.

2. Did the defendant, Kennedy *et al.*, execute and deliver a deed in fee simple to Keith Brothers for said land which plaintiffs accepted? Answer: Yes.

3. Are plaintiffs, Keith Brothers, the owners and entitled to the possession of the Dodge car referred to in the complaint? Answer: No.

4. What was the value of the said car at the time of the claim and delivery seizure? Answer: $550.

5. What sum, if anything, is due to plaintiffs for the use of said car by the defendant, Kennedy? Answer: ....

6. What damages, if any, is said Kennedy entitled to recover of the plaintiffs, Keith Brothers? Answer: $250."

John D. Bellamy & Sons and Robert W. Davis for plaintiffs.
C. Ed. Taylor and Woodus Kellum for defendant.

CLARKSON, J. The principles of law involved in the controversy are simple. The plaintiffs denied the contract as alleged by defendant and contended that the delivery of the deed was conditional and the condition was not fulfilled—the contract was executory and the statute of frauds was applicable. On the other hand the defendant, Kennedy, contended that the contract was executed, the deed delivered in compliance with the contract on his and the other defendant, Peterson's, part, interested in the trade, and they owning the land delivered the deed as agreed upon; that the title was good; that as for any taxes due, it was to be deducted from the $250; that the taxes have been paid, and they are now and at all times were able, ready and willing to carry out their part of the contract. The plaintiffs' witnesses testified to the facts as contended for by plaintiffs, and defendants to the contrary. The jury decided the facts in accordance with defendant's contentions.

The statute of frauds, C. S., 988, is as follows: "All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." The statute of frauds, *supra,* says *all contracts to sell or convey any lands,* etc., *shall be put in writing.* In the present case the jury found the trade was consummated and the deed delivered and accepted—the contract executed.

It was said in *Choat v. Wright,* 13 N. C., at p. 290: "In relation therefore to realty, not only the words of the act, 'a contract to sell,' but the state of the law before, restrains the statute to executory contracts." This is now and has always been the law of this jurisdiction. *Hall v. Fisher,* 126 N. C., p. 205; *McManus v. Tarleton,* 126 N. C., p. 790; *Brinkley v. Brinkley,* 128 N. C., p. 503; *Rogers v. Lumber Co.,* 154 N. C., p. 108; *Davis v. Harris,* 178 N. C., p. 24.

The exceptions and assignments of error as to the exclusion of evidence cannot be sustained. We think, from examination of the entire record, that the evidence excluded, if error, was cured by the same kind of evidence being permitted to be introduced without objection later in the trial. *Trust Co. v. Store Co.,* 193 N. C., p. 122.

The court below charged correctly as to the burden of proof and the other aspects of the law arising on the evidence. If plaintiffs desired more specific instructions they should have requested them by proper prayers. *Davis v. Long,* 189 N. C., at p. 137.

The charge must be taken as a whole and not disconnectedly, and so taken we find no reversible or prejudicial error. It was mainly a question of fact for the jury, and they decided for defendant, and we can find in law

No error.

THOMAS COWART v. SUNCREST LUMBER COMPANY AND DEWEY CORBIN.

(Filed 21 December, 1927.)

Removal of Causes — Diverse Citizenship — Severable Controversy — Fraudulent Joinder.

Upon a motion to remove a cause from the State to the Federal Court, the question of severable controversy will be determined in the State court from the facts as alleged in the complaint, and upon the question of fraudulent joinder of a resident defendant, the undisputed facts of the matter must unerringly lead to the legal conclusion that the moving defendant has the right under the Federal removal act.

Appeal by defendant, Suncrest Lumber Company, from *Stack, J.*, at May Term, 1927, of Haywood. Affirmed.

J. Frank Ray, Jr., and Morgan & Ward for plaintiff.
Rollins & Smathers for Suncrest Lumber Company.

Per Curiam. From a careful inspection of the record we are of the opinion that the court below was correct in denying the motion for removal of this action by the appellant defendant. This action is in many respects similar to *Crisp v. Fibre Co.*, 193 N. C., p. 77. We repeat what was held in the *Crisp action, supra,* at p. 85: "The facts alleged in the petition for removal neither compel nor point unerringly to the conclusion that the joinder in the instant case is a fraudulent one and made without right. We hold, therefore:

1. That when a motion to remove a suit or action from the State court to the District Court of the United States for trial is made on the ground of an alleged separable controversy, the question of separability is to be determined by the manner in which the plaintiff has elected to state his cause of action, whether separately or jointly, and, for this purpose, the allegations of the complaint are controlling. *Morganton v. Hutton,* 187 N. C., 736.

2. That when the motion to remove is made on the ground of an alleged fraudulent joinder, the petitioner is entitled to have the State court decide the question on the face of the record, taking, for this purpose, the allegations of the petition to be true. To warrant a removal in such case, however, the facts alleged in the petition must lead unerringly to the conclusion, or rightly engender and compel the conclusion, as a matter of law, aside from the deductions of the pleader, that the joinder is a fraudulent one in law and made without right. *Fore v. Tanning Co.,* 175 N. C., 584." The judgment below is

Affirmed.

EAST CAROLINA RAILWAY v. F. J. McGUIRE et al.

(Filed 14 September, 1927.)

Appeal by defendant, F. J. McGuire, from *Barnhill, J.,* at March Term, 1927, of Edgecombe.

Motion filed 18 October, 1926, by F. J. McGuire to set aside a judgment rendered on a verdict at the March Term, 1926, Edgecombe Superior Court. Motion denied 14 March, 1927. Movant appeals.

John L. Bridgers and Henry C. Bourne for plaintiff.
Whedbee & Whedbee for defendant, F. J. McGuire, appellant.

PER CURIAM. This is an appeal from a refusal to set aside a judgment on the ground of "mistake, inadvertence, surprise or excusable neglect." C. S., 600.

The judge, upon competent evidence, found facts from which he concluded, first, that the movant had failed to show any excusable neglect; and, second, that no meritorious defense had been made to appear. There is nothing on the record to warrant a reversal of the judgment. *Taylor v. Gentry,* 192 N. C., 503; *Cahoon v. Brinkley,* 176 N. C., 5; *Norton v. McLaurin,* 125 N. C., 185.

Affirmed.

THE TEXAS COMPANY v. L. S. BYRUM, TRADING AS TRIANGLE FILLING STATION.

(Filed 14 September, 1927.)

APPEAL by defendant from an order of *Clayton Moore, Special Judge,* made 22 June, 1927. From CHOWAN.

W. D. Pruden for plaintiff.
Ehringhaus & Hall and H. R. Leary for defendant.

PER CURIAM. This is an application for a restraining order to prevent the defendant from removing from the premises described in the pleadings certain property and equipment and from refusing to deal in the plaintiff's products. The plaintiff alleges that on 11 April, 1923, it leased from Sessoms and Wood a certain lot in Edenton for a term of three years from 1 May, 1923, and thereafter from year to year not exceeding two years, subject to termination by the lessee at the end of the original term, or any subsequent period by a written notice of thirty days; that at the same time the parties entered into a license agreement by which the plaintiff permitted Sessoms & Wood to occupy the premises upon agreed terms, and that the defendant succeeded to the rights of Sessoms & Wood. It is further alleged by the plaintiff that the defendant thereafter executed and submitted to it a proposed lease for a term of ten years from 1 May, 1926, which, after acceptance, was duly registered, and that the defendant in disregard thereof afterwards notified the plaintiff that it was his purpose to sever the contractual relation between them and to move the plaintiff's property from the premises. The defendant denied the execution of the ten-year lease and alleged that his only agreement with the plaintiff expired on 1 May, 1928.

The restraining order was continued and the defendant appealed. In this we think there was no error. The correspondence, exhibits and affidavits are not sufficiently definite for us to determine therefrom that the defendant is entitled as a matter of law to have the restraining order dissolved. The judgment is

Affirmed.

SWIFT & COMPANY v. J. W. BRINSON.

(Filed 14 September, 1927.)

CIVIL ACTION before *Daniels, J.*, at March Term, 1927, of CURRITUCK.

The plaintiffs brought a suit against the defendant upon a note for $296.69, dated 3 February, 1923. The note was given for the purchase price of fertilizer for sweet potatoes.

The defendant alleged that the fertilizer furnished by the plaintiffs was absolutely worthless and of no value or benefit to the crops.

The evidence disclosed that the defendant had executed an original note to the plaintiffs in payment of said fertilizer in the year 1922, and that the note upon which suit was brought was a renewal thereof. It further appeared that the crop matured in July or August, 1922.

The following issue was submitted to the jury: Did the plaintiffs fail to deliver to the defendant commercial fertilizer of the analysis guaranteed on the bag in accordance with their contract? The jury answered the issue, "Yes."

The trial judge declined to sign judgment for the defendant, but, upon the admissions in the record, entered judgment for the plaintiffs, from which judgment the defendant appealed.

Ehringhaus & Hall for plaintiffs.
Aydlett & Simpson for defendant.

PER CURIAM. This case is governed by the rules of law announced in the companion case of *Barco v. Forbes, ante,* 204.

Judgment affirmed.

J. M. EDGERTON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 28 September, 1927.)

APPEAL by defendant from *Harris, J.*, and a jury, at April Term, 1927, of WAYNE. No error.

This was an action for damages brought by plaintiff against defendant for negligence in transporting forty-six mules from National Stock Yards, Ill., to Goldsboro, N. C.

The issues submitted to the jury and their answers thereto were as follows:

"1. Were the mules of the plaintiff injured by the negligence of the defendant railroad company? Answer: Yes.

"2. In what amount, if any, is defendant indebted to plaintiff? Answer: $633.00, with interest."

Kenneth C. Royall and Jack Joyner for plaintiff.
Dickinson & Freeman and W. R. B. Guion for defendant.

PER CURIAM. The court below charged the jury clearly and accurately the law of actionable negligence applicable to the facts in the case.

From a careful reading of the record we can find no prejudicial or reversible error.

The action is similar and tried in accordance to the law as set forth in *Farming Co. v. R. R.*, 189 N. C., 63. The same principle is set forth in *C. & O. R. R. Co. v. Thompson Mfg. Co.*, 270 U. S., 416, 70 L. Ed., 659.

No error.

N. W. AND L. V. HARDISON v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 28 September, 1927.)

APPEAL by defendant from *Cranmer, J.*, at Spring Term, 1927, of PAMLICO.

Z. V. Rawls for plaintiffs.
Moore & Dunn for defendant.

PER CURIAM. The plaintiffs brought suit to recover $94.50 for loss sustained in the shipment of a car of potatoes from New Bern, N. C., to

Lynchburg, Va. There was evidence tending to show that the potatoes were carried in an open box car during very cold weather. In response to the issues the jury found that the defendant failed to provide a suitable and fit car and assessed the plaintiffs' damages at $94.50. Judgment was thereon given for the plaintiffs, from which the defendant appealed, assigning error. Upon an examination of the record we find no sufficient reason for granting a new trial.

No error.

STATE v. W. F. McFARLAND.

(Filed 28 September, 1927.)

APPEAL by defendant from *Harris, J.,* at May Term, 1927, of LEE. No error.

From judgment upon verdict finding defendant guilty of assault, causing serious damage to J. M. Monroe, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Seawell & McPherson and Hoyle & Hoyle for defendant.

PER CURIAM. The evidence in support of the verdict in this case is plenary. Defendant's contention that the assault was committed in his self-defense was properly submitted to the jury, and not sustained. We find no reversible error, and the judgment is affirmed.

No error.

DICEY ODEN v. ROBERT R. DAVIS.

(Filed 28 September, 1927.)

APPEAL by defendant from *Cranmer, J.,* at April Term, 1927, of CRAVEN.

Civil action to set aside deed for lot of land in the city of New Bern, alleged to have been fraudulently procured from the plaintiff by the defendant.

From a verdict and judgment in favor of plaintiff the defendant appeals, assigning errors.

Moore & Dunn for plaintiff.
Ward & Ward for defendant.

PER CURIAM. The controversy on trial narrowed itself to an issue of fact, determinable alone by the jury. A careful perusal of the record leaves us with the impression that the case has been heard and determined substantially in accord with the principles of law applicable, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

There is a sharp conflict in the evidence on the issue of liability, but this was purely a question of fact; the jury has determined the matter against the defendant; there is no reversible error appearing on the record; the exceptions relating to the admission and exclusion of evidence, and those to the charge, must all be resolved in favor of the validity of the trial; the case presents no new question of law, or one not heretofore settled by our decisions; it only calls for the application of old principles to new facts. The verdict and judgment must be upheld.

No error.

R. E. WADE v. W. H. LANE, THOMAS E. DARDEN AND TOWN OF DUNN.

(Filed 28 September, 1927.)

APPEAL by defendants, W. H. Lane and Thomas E. Darden, from *Harris, J.*, at Chambers, 26 March, 1927. From HARNETT. Affirmed.

This is an action in which the provisional remedy of injunction is asked.

James Best for plaintiff.
Young & Young for defendants, Lane and Darden.

PER CURIAM. On the record, as to material facts, there is serious conflict. The court below continued the restraining order, or injunction, until the final hearing, requiring plaintiff to give bond to defendants for any damages they may sustain. See *Wentz v. Land Co.*, 193 N. C., p. 32. The judgment below is

Affirmed.

STATE v. REUBEN GUTHRIE, WILLIAM BELL AND BENNIE GARNER.

(Filed 28 September, 1927.)

APPEAL by William Bell from *Cranmer, J.*, and a jury, at March Term, 1927, of CARTERET. Reversed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

S. H. Newberry for defendant, William Bell.

PER CURIAM. From a careful reading of the record in this action we are of the opinion that the evidence was not sufficient to be submitted to the jury. The judgment in the court below is

Reversed.

STATE v. DAVID MINTZ AND HERBERT ANDREWS.

(Filed 5 October, 1927.)

APPEAL by defendants from *Sinclair, J.*, at March Term, 1927, of ONSLOW. Indictment for larceny of a motor car.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Summersill & Summersill for defendants.

PER CURIAM. The defendants excepted to the verdict and judgment. The verdict was warranted by the evidence and the judgment is in due form.

No error.

JAMES MANN ET AL. v. H. J. KENNEDY, TRADING AS C. H. FOWLER & CO.

(Filed 5 October, 1927.)

APPEAL by defendant from *Cranmer, J.*, at May Term, 1927, of PAMLICO.

Civil action by one mortgagor and the representatives of another to recover of the mortgagee the excess for which the mortgaged premises, when sold under foreclosure, brought over and above the mortgage debt.

Upon the facts found by his Honor, by consent sitting as both judge and jury, judgment was entered for the plaintiffs. Defendant appeals, assigning errors.

F. C. Brinson for plaintiffs.
Z. V. Rawls and Ward & Ward for defendant.

PER CURIAM. Out of a confused record one fact at least seems clear, to wit, that no reversible error has been made to appear. The rights of the parties are dependent upon the facts, which have been found against the defendant.

No error.

STATE v. JAMES H. PRIDGEN.

(Filed 5 October, 1927.)

APPEAL by defendant from *Cranmer, J.,* at June Term, 1927, of GREENE. No error.

Defendant was convicted in the county court of Greene County upon a warrant charging that he had violated the prohibition law. From judgment upon his conviction he appealed to the Superior Court.

Upon his trial in the Superior Court there was a verdict of guilty. From judgment upon the verdict defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
J. Paul Frizzelle and Luke Lamb for defendant.

PER CURIAM. There was no error in the refusal of the court to dismiss the action, upon defendant's motion, at the close of the evidence. C. S., 4643. The evidence was properly submitted to the jury; it is sufficient as a matter of law to support the verdict.

Two of the State's witnesses, after defendant had testified as a witness in his own behalf, as shown by the record, in response to questions as to his general character, testified that they heard that defendant is a notorious blind tiger. Defendant objected to these statements of the witnesses. No motion, however, was made to strike them from the record.

A reasonable interpretation of the record shows that each of the witnesses had qualified as a character witness before he testified that he had heard that defendant is a notorious blind tiger. *S. v. Mills,* 184 N. C., 694, is therefore not applicable.

In *S. v. Butler,* 177 N. C., 585, it is said: "It was open to the witness, having stated that he knew the defendant's general character, to qualify and explain his answer as to what it was by saying that it was bad for selling liquor."

The record in this case does not present the questions decided in *S. v. Mills, supra.* Upon the record we find

No error.

N. B. JOSEY COMPANY v. MRS. KATIE L. YARBORO AND O. Y. YARBORO.

(Filed 12 October, 1927.)

APPEAL by Katie L. Yarboro from *Grady, J.,* and a jury, at March Term, 1927, of HALIFAX. No error.

The following are the issues submitted to the jury and their answers thereto:

"1. Did Mrs. Kate L. Yarboro endorse the note for $3,445, made by O. Y. Yarboro to the plaintiff, upon the promise of N. B. Josey that he would discount her four notes, each in the sum of $5,000, secured by a deed of trust on lands in Franklin County, as alleged in the answer? Answer: No.

"2. At the time of the delivery to the plaintiff of the $20,000 notes, referred to in the first issue, did the plaintiff agree in consideration thereof that it would cancel and surrender to the defendants the $10,000 note made by Mrs. Kate L. Yarboro to E. H. Malone, and assigned by O. Y. Yarboro to the plaintiff, as alleged in the answer? Answer: No.

"3. After the plaintiff failed to discount said $20,000 worth of notes, did the plaintiff agree to release the $10,000 note and deed of trust, and thereby restore the defendants to the same position that they occupied before the execution of the said $10,000 note? Answer: No."

Judgment by the court below was duly rendered on the issues. Defendant Katie L. Yarboro made numerous exceptions and assignments of error and appealed to the Supreme Court.

Travis & Travis and Ashby Dunn for plaintiff.

Ben T. Holden, W. H. Yarborough and White & Malone for defendants.

PER CURIAM. The record discloses that the charge of the court below covers nineteen pages. In the charge each issue was read to the jury and the contentions of the parties carefully given on same and the law applicable. We can discover no error in the charge nor in the admission or exclusion of evidence. In the nineteen pages of the charge of the court below the "specific" exceptions to the charge are not set forth.

"We have no power here except to 'review upon appeal any decision of the courts below, *upon any matter of law or legal inference.*' Const. of N. C., part Art. IV, sec. 8." *Rawls v. Lupton,* 193 N. C., p. 428.

It may be noted that no legal authorities are cited in the briefs of the learned counsel for plaintiff or defendant. The facts as found by the jury were in favor of plaintiff and against the defendant. On the record we can find

No error.

A. M. McLEAN v. STATE BANK OF McBEE ET AL.

(Filed 12 October, 1927.)

APPEAL by defendant, State Bank of McBee, from *Harris, J.,* at February Term, 1927, of HARNETT.

Civil action to restrain the sale of a tract of land in Harnett County until the claims of mortgagees, judgment creditors and the plaintiff, who alleges that he has a contract to buy said land, can be determined and adjudicated.

From a judgment overruling a demurrer interposed by the State Bank of McBee upon the ground (1) that the complaint does not state facts sufficient to constitute a cause of action against said defendant, and (2) that there is a misjoinder both of parties and causes of action, the said demurring defendant appeals, assigning error.

Young & Young for plaintiff.
Hoyle & Hoyle for defendant, State Bank of McBee.

PER CURIAM. Without detailing the allegations of the complaint, which are quite lengthy, we are convinced from a perusal of the record, that the demurrer was properly overruled on both grounds.

Affirmed.

J. T. MORTON v. G. T. WALTON.

(Filed 12 October, 1927.)

APPEAL by plaintiff from *Sinclair, J.*, at April Term, 1927, of ONSLOW. Affirmed.

N. E. Day and Cowper, Whitaker & Allen for plaintiff.
Summersill & Summersill and John D. Warlick for defendant.

PER CURIAM. This was an action to recover damages for personal injury. The plaintiff alleged that the defendant was engaged as overseer for the Onslow County road commission, and while building a certain road negligently left a stump in it, and that the car in which the plaintiff was traveling was driven against the stump, whereby the plaintiff was injured. At the conclusion of the evidence the action was dismissed as in case of nonsuit. We have carefully examined the record and are of opinion that it does not disclose a case of actionable negligence. The judgment is

Affirmed.

W. N. THOMAS v. BUS LINE.

(Filed 19 October, 1927.)

CIVIL ACTION, before *Harris, J.*, at March Term, 1927, of CHATHAM.

The plaintiff sued the defendant for negligently striking and damaging his automobile on a public highway. The defendant denied that it was negligent and pleaded contributory negligence of the plaintiff as a bar to recovery.

There was a verdict for the plaintiff in the sum of $175. From judgment thereon the defendant appealed.

W. P. Horton for plaintiff.
Siler & Barber for defendant.

PER CURIAM. The record presents an issue of fact and no more. The plaintiff's testimony tends to show negligence on the part of defendant. The evidence of defendant tends to show contributory negligence on the part of the plaintiff.

The charge of the court is not included in the record, and therefore it is presumed that the trial judge properly instructed the jury upon each and every phase of the law applicable to the facts. In this situation the jury was the sole arbiter.

No error.

MRS. RUBY O'QUINN v. C. J. O'QUINN.

(Filed 26 October, 1927.)

CIVIL ACTION, before *Bowie, Special Judge,* at June Term, 1927, of LENOIR.

The plaintiff instituted an action against her husband, the defendant, for alimony without divorce. Issues were submitted to the jury and answered in favor of the plaintiff.

From judgment, awarding alimony and counsel fees, the defendant appealed.

Sutton & Greene for plaintiff.
Shaw & Jones for defendant.

PER CURIAM. The record presents an unfortunate marital disagreement and controversy culminating in a lawsuit. Both parties made out a good case. The charge of the trial judge is without reversible error. The evidence discloses an issue of fact only, and the jury, in the exercise of the function delegated to it by law, has found the facts against the defendant, and the judgment as rendered is

Affirmed.

GREENSBORO BANK AND TRUST CO. v. B. S. ROYSTER ET AL.

(Filed 26 October, 1927.)

1. Equity—Judgments—Findings of Fact.

In a bill in equity the facts of the controversy should be made to appear on appeal.

APPEAL by Greensboro Bank & Trust Company from *Devin, J.,* at Chambers, 2 April, 1927. From GRANVILLE.

A. W. Graham & Son for Morton and Watkins, purchasers.
Hester & Rooker for appellants.

PER CURIAM. This was a motion in the cause made by S. V. Morton and R. C. Watkins to have the interest on the unpaid part of the purchase price of land remitted after 25 March, 1925. The purchasers alleged that the Greensboro Bank & Trust Company as commissioners sold them certain lands in Granville County, known as the Pitchford land, at the price of $9,103.18; that the terms of sale were 15% cash, 10% additional upon confirmation of the sale, and 75% in three equal annual installments with interest at 6%—the purchasers to have the privilege of making payment at an earlier date; that they had made the initial payment of 25% ($2,275.80); that on 25 March, 1925, they notified the bank's attorney that they had the money on deposit to pay the remainder due and that they would not pay interest after that date. The deed was tendered them 10 January, 1927. The purchasers contended that they were liable for $6,827.38 with interest only from 25 March, 1925.

An answer was filed in which the material allegations upon which the motion was based were denied. It was adjudged that the commissioner execute and deliver a deed to the purchasers upon their paying the balance of the purchase money with interest thereon after 25 March, 1925. The commissioner excepted and appealed.

The record comprises the allegations upon which the purchasers based their motion and the answer thereto; and upon this record it was ordered that the interest be remitted as prayed.

The judgment does not contain such findings of fact as are necessary to a final determination of the controversy. In equitable matters in which this Court has a right to find the facts it may do so even if they have not been found by the lower court; but the record presents only matters of law and the facts should be set out in the judgment. We therefore remand the cause without decision in order that all the facts in reference to the negotiations between the purchasers and the commissioner may be found and embodied in the judgment. *Bradley v. Jones,* 76 N. C., 204; *Weil v. Everett,* 83 N. C., 685; *Pearce v. Elwell,* 116 N. C., 595.

Remanded.

HUGH T. TYLER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 October, 1927.)

APPEAL by plaintiff from *Bond, J.,* at February Term, 1927, of NEW HANOVER. Affirmed.

Hugh N. Pace and Rogers & Rogers for plaintiff.
Rountree & Carr and L. J. Poisson for defendant.

PER CURIAM. The defendant was engaged in the construction of a coal chute. (1) Plaintiff and three others were engaged in carrying wooden sills of ordinary pine covered with creosote, weighing 1,060 pounds, 16 to 18 feet long, 12 x 12, over soft and sandy ground and high embankments, two in front and two behind. Lug hooks were used. The negligence alleged was insufficient help, additional aid requested and refused by defendant. The plaintiff's back was injured by the heavy strain. (2) Following this plaintiff was ordered to work on another job handling a heavy iron roller 300 or 400 pounds weight. The negligence alleged was also insufficient help and additional aid requested and refused by defendant. Plaintiff alleges from the two causes of actionable negligence he was permanently injured. Defendant in answer denies the material allegations of the complaint and alleges that at the time of plaintiff's alleged injury it was engaged in interstate commerce and the question of actionable negligence is regulated and controlled by the Federal Employer's Liability Act. It denied any negligence and pleads assumption of risk and contributory negligence. It was conceded that the actionable negligence, if any, was controlled by the Federal Employers' Liability Act. We have examined the record carefully and the briefs of plaintiff and defendant. We have heard the oral argument of the learned counsel in the cause. From the testimony of plaintiff and his witnesses we do not think the evidence sustains the allegations of the complaint of plaintiff alleging actionable negligence in the two particulars set out and sufficient to be submitted to a jury.

At the close of the plaintiff's evidence the defendant moved for judgment as in case of nonsuit. C. S., 567. The court below granted the motion which we think correct in law. The judgment is

Affirmed.

CONSOLIDATED INSURANCE AND REALTY COMPANY v. PEARL MARTIN ET AL., AND J. B. WADDELL v. CONSOLIDATED INSURANCE AND REALTY COMPANY ET AL.

(Filed 26 October, 1927.)

APPEAL by J. B. Waddell from *Sinclair, J.,* at August Term, 1927, of DURHAM.

Civil actions in claim and delivery brought to determine the ownership and to recover the possession of a Dodge automobile, plaintiff in each suit asserting superior right to the property.

The two cases were consolidated and tried as one, and resulted in the following verdict:

"1. Is the plaintiff, Consolidated Insurance and Realty Company, the owner and entitled to the possession of the Dodge roadster automobile in controversy? Answer: Yes.

"2. Is the plaintiff, J. B. Waddell, the owner and entitled to the possession of the Dodge roadster automobile in controversy? Answer: ....

"3. What was the value of the Dodge roadster automobile in controversy? Answer: $1,000."

From a judgment on the verdict in favor of the Consolidated Insurance and Realty Company, J. B. Waddell, plaintiff in the second action, appeals, assigning errors.

William B. Guthrie and Walter B. Bass for appellant.
Brawley & Gantt for appellee.

PER CURIAM. The controversy on trial narrowed itself to an issue of fact, determinable alone by the jury. A careful perusal of the record leaves us with the impression that the case has been heard and determined substantially in accord with the principles of law applicable, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error. The case presents no new question of law, or one not heretofore settled by our decisions; it only calls for the application of old principles to new facts. The verdict and judgment must be upheld.

No error.

D. L. LATHAM ET AL. v. JAMES H. HARRIS, SHERIFF OF BEAUFORT COUNTY.

(Filed 26 October, 1927.)

APPEAL by plaintiffs from judgment of *Midyette, J.,* rendered at Chambers, on 3 September, 1927. Affirmed.

Plaintiffs by this action seek to have defendant, sheriff of Beaufort County, restrained and enjoined from enforcing in his county a criminal statute—chapter 349, Public-Local Laws 1925—against them and others who have violated or who may hereafter violate its provisions, upon their allegation that said statute is void and unconstitutional.

From judgment dissolving a temporary restraining order theretofore issued, and dismissing the action, plaintiffs appealed to the Supreme Court.

Ward & Grimes for plaintiffs.
Attorney-General Brummitt and Assistant Attorney-General Nash and Harry McMullan for defendant.

PER CURIAM. Plaintiffs, by this action to restrain and enjoin defendant, sheriff of Beaufort County, from enforcing a criminal statute in said county, seek to present for decision the question as to the constitutionality of the statute. It has been repeatedly held that this cannot be done. *Moore v. Bell,* 191 N. C., 305, and cases therein cited. There are no sufficient allegations in the complaint that property rights of plaintiffs are or will be affected by the enforcement of the statute to bring the action within the principle recently restated in *Angelo v. City of Winston-Salem,* 193 N. C., 207.

The temporary restraining order was improvidently made. The judgment dissolving this order and dismissing the action is

Affirmed.

JANIE GILL, ADMINISTRATRIX OF MARTHA GILL, v. CEASES' LUNCH SYSTEM, INC.

(Filed 26 October, 1927.)

APPEAL by plaintiff from *Sinclair, J.,* at May Special Term, 1927, of DURHAM.

Brawley & Gantt for plaintiff.
Fuller, Reade & Fuller for defendant.

PER CURIAM. This was an action for the recovery of damages for the death of the plaintiff's intestate alleged to have been caused by her eating unwholesome food negligently provided in the defendant's cafeteria. At the close of the evidence the action was dismissed as in case of nonsuit. The judgment is affirmed on the authority of *Lamb v. Boyles,* 192 N. C., 542. See annotation in 49 A. L. R., 592.

Affirmed.

E. F. SHUTT, ADMINISTRATOR, v. REYNOLDS-LYBROOK FARM.

(Filed 2 November, 1927.)

APPEAL by plaintiff from *Harding, J.,* at March Term, 1927, of FORSYTH.

Civil action in tort to recover damages for the death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of defendant.

Eugene Shutt, a man 34 years of age, had worked on defendant's farm for more than seven years and had been foreman of the place about three and one-half years, when on 29 September, 1923, while disking a field with a caterpillar tractor, preparatory to sowing grain, he was mortally injured in a fall beneath the tractor as it ran too near a ditch, the bank giving way and causing the tractor to turn over.

It is not alleged that the tractor was defective. Plaintiff bottoms his action on the alleged circumstance of negligence in that the defendant failed to warn the deceased of the soft ground and the danger of running too near the ditch.

At the close of plaintiff's evidence the defendant lodged a motion for judgment as in case of nonsuit, which was allowed. Plaintiff appeals, assigning error.

Wallace & Wells and Benbow, Hall & Benbow for plaintiff.
Manly, Hendren & Womble for defendant.

PER CURIAM. Plaintiff's intestate was the victim of an unfortunate accident, but the evidence fails to disclose any liability on the part of the defendant.

Affirmed.

C. H. SCALES v. R. E. WALL.

(Filed 9 November, 1927.)

APPEAL by defendant from *Harding, J.,* at June Term, 1927, of ROCKINGHAM. No error.

Action to recover upon accounts for supplies sold and delivered by plaintiff, a merchant, to tenants of defendant, a landlord. Plaintiff alleged that prior to the sale and delivery of said supplies defendant agreed to pay for same; this allegation was denied by defendant. The issue was answered by the jury in accordance with the contention of plaintiff.

From judgment upon the verdict defendant appealed to the Supreme Court.

Swink, Clement & Hutchins for plaintiff.
McMichael & McMichael and Manly, Hendren & Womble for defendant.

PER CURIAM. The only matter involved in the controversy which is the subject of this action is whether or not defendant agreed, prior to the sale and delivery of supplies to his tenants, to pay plaintiff for same. There was evidence tending to support the contention of each of the parties with respect to this matter. This evidence was submitted to the jury, who returned a verdict for the plaintiff. We find no error, and the judgment is affirmed.

Defendant's motion, made in this Court for a new trial, for newly discovered evidence is denied. It appears from the affidavits filed upon the hearing of this motion, that the evidence which defendant alleges he has discovered since the trial, is merely cumulative. At best it tends only to contradict the plaintiff and to corroborate the defendant, both of whom testified at the trial. See *Alexander v. Cedar Works,* 177 N. C., 536. The rule there stated is as follows: "The Supreme Court will not order a new trial for newly discovered evidence that is merely cumulative, or without probability that the result will thereby be changed."

No error.

ATWATER v. HUGHES AND CROTTS.

(Filed 9 November, 1927.)

CIVIL ACTION, before *Midyette, J.*, at March Term, 1927, of DURHAM.

Plaintiff brought suit against the defendants on a promissory note. The defendants alleged that the note as drawn was payable one year after date, whereas there was an agreement between the parties that it should be payable three years after date, and asked for reformation of the note upon the ground of fraud, and as a cause of action against the plaintiff, set up a counterclaim for damages arising from misrepresentation in a sale of timber made by the plaintiff to the defendants, said note being part of the purchase price.

Issues of fraud and damage were submitted to the jury and answered against the defendants and in favor of the plaintiff for the face amount of said note with interest thereon.

From judgment upon the verdict the defendants appealed.

McLendon & Hedrick for plaintiff.
Mel J. Thompson for defendants.

PER CURIAM. This record presents solely and exclusively a question of fact. The cause was submitted to the jury upon a charge totally free from error. A consideration of the entire record unerringly leads to the conclusion that the rights of the parties have been determined in accordance with law.

No error.

J. A. BOLICH, JR., ET AL. v. T. D. TYACK.

(Filed 9 November, 1927.)

APPEAL by defendant from *Harding, J.*, at May Term, 1927, of FORSYTH.

Civil action to recover penalty for usury, tried in the Forsyth County Court on the following issues:

"1. Did the defendant knowingly take, charge and receive from the plaintiffs a greater rate of interest than six per cent per annum, on a loan or forbearance of money, as alleged in the complaint? Answer: Yes.

"2. Is the plaintiffs' cause of action barred by the statute of limitations? Answer: No.

"3. In what amount, if any, are the plaintiffs entitled to recover of the defendant, as penalty for usury? Answer: $4,362.92, with interest from 4 June, 1925."

On appeal to the Superior Court the judgment of the county court was upheld, and from this ruling the defendant appeals, assigning errors.

Fred M. Parrish for plaintiffs.
Manly, Hendren & Womble for defendant.

PER CURIAM. The controversy on trial narrowed itself to issues of fact, determinable alone by a jury. A careful perusal of the record leaves us with the impression that the case has been heard and determined substantially in accord with the principles of law applicable, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

There is a sharp conflict in the evidence on the issue of liability, but this was purely a question of fact; the jury has determined the matter against the defendant; there is no reversible error appearing on the record; the exceptions relating to the admission and exclusion of evidence, and those to the charge, must all be resolved in favor of the validity of the trial; the case presents no new questions of law, or one not heretofore settled by our decisions; it only calls for the application of old principles to new facts. The verdict and judgment must be upheld.

Affirmed.

A. T. JULIAN v. CITY OF WINSTON-SALEM ET AL.

(Filed 16 November, 1927.)

Appeal and Error—Divided Court—Law of the Case.

Where one of the Justices of the Supreme Court takes no part in the decision of the case, and the other four are equally divided in their opinion, the judgment of the lower court is the law of the case, but not to be regarded as a precedent.

APPEAL by defendants from *Harding, J.*, at May Term, 1927, of FORSYTH.

W. R. Dalton for plaintiff.
Fred M. Parrish for defendants.

PER CURIAM. One member of the Court not sitting and the others being equally divided in opinion, the judgment will not be disturbed, but the decision will not become a precedent.

No error.

PAGE TRUST COMPANY AND S. O. BAUERSFELD, RECEIVERS OF THE BANK OF HAMLET, v. R. LEVIN, H. LEVIN AND J. LEVIN, COPARTNERS, TRADING AS R., H. AND J. LEVIN.

(Filed 16 November, 1927.)

APPEAL by plaintiff from *Lyon, Special Judge,* at March Term, 1927, of RICHMOND.

Civil action to recover balance alleged to be due on promissory note.

Defendants claimed a set-off to the amount of moneys had on deposit in the Bank of Hamlet at the time of its closing.

Upon the facts found by the judge, by consent, sitting as both judge and jury, a trial by the latter being waived, judgment was entered for the defendants for the excess of the amount on deposit over the balance due on the note in suit. Plaintiffs appeal, assigning error.

Bynum & Henry for plaintiffs.
W. R. Jones for defendants.

PER CURIAM. The case is controlled by what was said in *Coburn v. Carstarphen, ante,* 368, 139 S. E., 596; *Williams v. Coleman,* 190 N. C., 368, 129 S. E., 818, and *Davis v. Mfg. Co.,* 114 N. C., 321, 19 S. E., 371. The judgment must be upheld on authority of these cases.

Affirmed.

STATE v. W. C. MICKLE AND CARL HILL.

(Filed 23 November, 1927.)

APPEALS by defendants from *Townsend, Special Judge,* at May Special Term, 1927, of FORSYTH. No error.

Criminal actions against defendants, in which each was charged with the wilful and unlawful operation of an automobile on a public highway in this State were, by consent, consolidated for trial.

From judgment on the verdict in each action defendants appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

M. L. Mott, Jr., for defendants.

PER CURIAM. Upon their appeal to this Court both defendants rely upon assignments of error based on exceptions to the refusal of the court to allow their motions for judgment as of nonsuit. C. S., 4643. These assignments of error are not sustained. The evidence was properly submitted to the jury and tended to show that each of the defendants operated an automobile on a public highway in this State, wilfully and recklessly, in violation of C. S., 2618. There is no error in the judgment that each defendant be confined in the county jail of Forsyth County for thirty days, with capias to issue upon motion of the Solicitor for the State, etc. C. S., 2599.

No error.

CHLOE TINSLEY v. CITY OF WINSTON-SALEM.

(Filed 23 November, 1927.)

CIVIL ACTION before *Finley, J.,* at February Term, 1927, of FORSYTH.

This was a civil action for damages for personal injury sustained by plaintiff by reason of slipping into an uncovered or unguarded hole or excavation on North Elm Street. There was judgment for the plaintiff and the defendant appealed, assigning errors.

Wallace & Wells for plaintiff.

Fred M. Parrish for defendant.

PER CURIAM. This case was considered by the Court upon a former appeal, which is reported in 192 N. C., p. 597. This decision becomes the law of the case so far as the subsequent trial is concerned. *Nobles v. Davenport,* 185 N. C., 162; *Mfg. Co. v. Hodgins,* 192 N. C., 577.

After a careful examination of the record and briefs of counsel for the parties, the court is of the opinion that no error of law was committed upon the trial, and the judgment of the trial court is upheld.

No error.

CHARLOTTE-CONCORD BUS LINE v. GIBBONS TRANSFER COMPANY.

(Filed 30 November, 1927.)

APPEAL by defendant from *Schenck, J.,* at February Term, 1927, of CABARRUS. No error.

Hartsell & Hartsell for plaintiff.

P. W. Garland and Armfield, Armfield, Sherrin & Barnhardt for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for injury to its bus alleged to have been caused by the defendant's negligence. The defendant answered, denying the plaintiff's allegations, and set up a cross-action for the recovery of damages against the plaintiff. The alleged causes arose from a collision on a public highway between the plaintiff's bus and the defendant's moving van. Appropriate issues were submitted upon both causes and were answered in favor of the plaintiff.

We find upon an examination of the record that the controversy between the parties has been tried and determined in substantial compliance with the controlling principles of law and that the appellant has shown no sufficient cause for our disturbing the verdict or the judgment.

No error.

J. C. SPARKS v. JOHN SPARKS AND WIFE.

(Filed 7 December, 1927.)

1. Deeds and Conveyances—Conditions—Conditions Precedent—Issues.

A grantor in a deed having a condition precedent, in an action to recover land for condition broken has the right to have the issue of rents and profits submitted to the jury, when there is evidence thereof.

2. Appeal and Error—Harmless Error—Instructions.

A party cannot take advantage of an error committed in his favor.

3. Same.

An instruction of the lower court will not be held for error unless it is made to appear that a different verdict might have been rendered.

APPEAL by defendants from *Moore, J.*, at July Term, 1927, of YANCEY. Modified and affirmed. The verdict was as follows:

1. Did the plaintiff execute deed as alleged in the complaint and admitted in the answer? Answer: Yes.

2. Has the defendant complied with the conditions named in said deed? Answer: No.

3. Is the defendant in the unlawful and wrongful possession of the lands mentioned in said deed? Answer: Yes.

R. W. Wilson and Watson, Hudgins, Watson & Fouts for plaintiff.
Charles Hutchins for defendant.

PER CURIAM. On 11 August, 1926, the plaintiff executed and delivered to the defendants a deed for 50 acres of land. At that time the plaintiff, father of the defendant John Sparks, was seventy-nine years of age. In the premises of the deed is this clause: "Witnesseth: That the said J. C. Sparks for and in consideration of the love and affection he has for his son, John H. Sparks, and for the further consideration, which consideration is a condition precedent to the ultimate vesting of the title to the lands hereinafter conveyed and a condition running with this deed as long as the said J. C. Sparks may live, that the said parties of the second part shall fully and amply care for the said J. C. Sparks during his old age and as long as he shall live by feeding, clothing, providing fuel, and nursing him in sickness, and fully and amply caring for him in sickness and in health during his life time, has given, granted, bargained, sold and conveyed, etc."

We find no error for which the verdict should be set aside. By the terms of the deed the support of the plaintiff is a condition precedent to the ultimate vesting of the title. *Nunnery v. Carter*, 58 N. C., 370; *Lefler v. Rowland*, 62 N. C., 143. The reference to the "evidence of the plaintiff in his contentions," if error, could hardly have misled the jury in view of the specific instructions that the burden was on the plaintiff to show by the greater weight of the evidence that the conditions set forth in the deed had not been complied with and that he was entitled to have the issues answered in his favor. The later instruction as to the degree of proof was an error against the plaintiff, of which the defendant cannot take advantage.

There is error, however, in the judgment. Neither of the issues has any reference to the rents or to the amount received from the sale of the telephone poles, and we find no evidence of the defendants' consent to this part of the judgment. In fact they excepted. The plaintiff is not precluded from having proper issues submitted to the jury for the determination of these questions. The judgment is thus

Modified and affirmed.

JAY CHAPMAN v. C. F. LINEBERRY ET AL.

(Filed 7 December, 1927.)

APPEAL by defendant, C. F. Lineberry, from order of *McElroy, J.*, at September Term, 1927, of ALEXANDER. Affirmed.

Motion by defendant, C. F. Lineberry, to set aside judgment rendered and verdict returned in this action at March Term, 1927, of Superior Court of Alexander County, for that same were irregular and were due to the excusable neglect of defendant to appear and defend the action. Defendant alleges that he has a meritorious defense.

From order refusing to allow the motion defendant appealed to the Supreme Court.

F. J. McDuffie and J. H. Burke for plaintiff.
W. M. Allen and W. C. Newland for defendant.

PER CURIAM. Upon the facts found by the judge, upon the hearing of the motion, we find no error in his order refusing defendant's motion. Both complaint and answer had been duly filed prior to March Term, 1927, and the action was docketed for trial at said term. This term was held in accordance with the provisions of the statutes relative to terms of the Superior Courts to be held in the several counties of the State. Defendant's failure to attend and defend the action at the March Term cannot, upon the facts found, be held excusable.

Issues were submitted to a jury, and plaintiff offered evidence from which the jury returned the verdict under instruction of the court. This verdict supports the judgment. If there was error defendant's remedy was by appeal and not by motion to set aside the judgment and verdict. We find no error, and the order is

Affirmed.

F. E. McCASKILL v. LORENZO McCASKILL ET AL., ADMINISTRATORS.

(Filed 7 December, 1927.)

Appeal by defendants from *Schenck, J.,* at June Special Term, 1927, of Montgomery.

Civil action brought by Florence E. McCaskill against the administrators of her father's estate to recover on contract or *quantum meruit* for services rendered defendants' intestate over a period of three years immediately prior to his death.

Upon denial of liability and a counterclaim set up for board and lodging of plaintiff's three small children during the time she was at defendants' intestate's home, the jury returned the following verdict:

"1. What amount, if any, is the plaintiff, F. E. McCaskill, entitled to recover of the defendants, J. C. McCaskill *et al.,* administrators of A. B. McCaskill, deceased? A. $1,620.

"2. What amount, if any, are the defendants, J. C. McCaskill *et al.,* administrators of A. B. McCaskill, deceased, entitled to recover of the plaintiff, F. E. McCaskill? Answer: $864."

From a judgment on the verdict in favor of plaintiff for the difference between the amounts set down as answers to the first and second issues, the defendants appeal, assigning errors.

B. S. Hurley and Brittain, Brittain & Brittain for plaintiff.
R. T. Poole and H. F. Seawell & Son for defendants.

Per Curiam. The controversy on trial narrowed itself to issues of fact, determinable alone by a jury. No reversible error has been made to appear on any of appellants' exceptive assignments of error. The verdict and judgment, therefore, will not be disturbed.

No error.

C. D. BUCHANAN v. B. & D. COACH LINE, INC., ET AL.

(Filed 7 December, 1927.)

Appeal by defendant, B. & D. Coach Line, Inc., from *Parker, J.,* at June Term, 1927, of McDowell.

Motion to set aside judgment rendered on a verdict awarding the plaintiff $500 as damages in a suit for personal injuries, at the Spring Term, 1927, McDowell Superior Court. Motion denied, and defendant appeals.

Morgan & Ragland for plaintiff.
Walter C. Feimster and Hester & Rooker for defendant, B. & D. Coach Line, Inc.

PER CURIAM. This is an appeal by the defendant, B. & D. Coach Line, Inc., from a refusal to set aside a judgment awarding plaintiff damages for personal injuries sustained while a passenger in one of the defendant's busses, on 8 November, 1926. The judge found that the defendant had a meritorious defense, but that it had shown no "mistake, inadvertence, surprise or excusable neglect" in allowing judgment to be taken in the action. C. S., 600.

Upon the facts found by the trial court and embodied in the judgment, we see no valid reason for disturbing his ruling on the motion. *Cahoon v. Brinkley,* 176 N. C., 5, 96 S. E., 650. It would serve no useful purpose to set out the judgment in full.

Affirmed.

J. E. CECIL v. F. G. BARBEE.

(Filed 7 December, 1927.)

APPEAL by defendant from *Parker, J.,* at May Term, 1927, of GUILFORD. Affirmed.

Action to recover balance due on building contract. Defendant denies that he is indebted to plaintiff in the sum alleged in the complaint; he pleads counterclaims, upon which he demands judgment against plaintiff. The action was referred to a referee for trial.

From judgment overruling defendant's exceptions to the report of the referee, and sustaining said report, defendant appealed to the Supreme Court.

Gold & York for plaintiff.
Brittain, Brittain & Brittain for defendant.

PER CURIAM. Upon an examination of the record on this appeal, and a consideration of the briefs filed in this Court by both parties, we find no error. The action arises out of controversies as to facts only; the findings of the referee are sustained by the judge. The evidence offered at the trial before the referee is not set out in the case on appeal. It must be presumed that there was evidence tending to prove the facts found by the referee and approved by the judge.

Upon these findings of fact there is no error and the judgment is
Affirmed.

ADA LAMBETH v. R. J. REYNOLDS TOBACCO COMPANY.

(Filed 14 December, 1927.)

CIVIL ACTION, before *Harding, J.*, at July Term, 1927, of DAVIDSON.

The testimony tended to show that the plaintiff was employed by the defendant to feed and operate a cigarette packing machine and that she was required to "keep it clean and brush it off at 4 o'clock and keep it clean from cigarettes." The plaintiff testified that she was never told to stop the machine or how to stop it when it became necessary to clean it. That in attempting to clean the machine while in motion a cup on the machine hit her hand and knocked it in the machine, cutting off the end of her right index finger.

Issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered in favor of plaintiff.

From judgment of the court upon the verdict the defendant appealed.

Wallace & Wells and Phillips & Bowers for plaintiff.
Raper & Raper and Earle McMichael for defendant.

PER CURIAM. The record presents issues of fact only. These issues were submitted to the jury upon a correct charge to which no exception was taken. A perusal of the case convinces us that no error was committed in the trial, and the judgment is affirmed.

No error.

W. E. WOOTEN v. B. F. HUNTLEY FURNITURE COMPANY.

(Filed 14 December, 1927.)

APPEAL by defendant from *Lyon, Special Judge,* at September Term, 1927, of FORSYTH.

Civil action to recover damages for an alleged negligent injury, resulting in the loss of plaintiff's right eye and other personal injuries, tried in the Forsyth County Court on the usual issues of negligence, contributory negligence and damages, and resulting in a verdict and judgment for the plaintiff.

On appeal to the Superior Court all exceptions were overruled, and the judgment of the county court upheld and affirmed. From this judgment the defendant appeals, insisting on the exceptions taken to the trial, which were overruled in the Superior Court.

Wallace & Wells for plaintiff.
Manly, Hendren & Womble for defendant.

PER CURIAM. A careful perusal of the record leaves us with the impression that the case has been heard and determined substantially in accord with the principles of law applicable, and that the rulings of the Superior Court should be upheld. The appeal presents no new question of law, or one not heretofore settled by our decisions; it only calls for the application of old principles to new facts.

Affirmed.

THOMAS A. CROOM v. J. N. BRYANT.

(Filed 14 December, 1927.)

APPEAL by defendant from *Bond, J.*, at February Term, 1927, of NEW HANOVER.

Civil action brought by plaintiff, a broker, to recover of defendant, owner, commissions for the sale of a lot of land alleged to be due under a contract of agency.

Upon denial of liability and issue joined, the jury returned the following verdict:

"Is the defendant Bryant indebted to the plaintiff Croom, and if so, in what amount? Answer: Yes, to amount as set out in complaint."

From a judgment on the verdict in favor of the plaintiff and against the defendant for $587.50, the amount demanded in the complaint, the defendant appeals, assigning errors.

J. G. McCormick for plaintiff.
Nathan Cole and W. F. Jones for defendant.

PER CURIAM. The contract of agency is not seriously questioned, though it is contended that the power of agency, being revocable as it was not coupled with an interest, was revoked before the plaintiff produced a purchaser ready, able and willing to take the property, and who did later purchase it direct from the owner, defendant herein. This was purely a question of fact which the jury has determined in favor of the plaintiff. The law of the case is settled in *Auction Co. v. Brittain,* 182 N. C., 676, 110 S. E., 82; *House v. Abell, ibid.,* 619, 109 S. E., 877; *Aycock v. Bogue, ibid.,* 105, 108 S. E., 434.

No error.

ARTHUR T. PRITCHARD AND GEORGE PRITCHARD v. JACK DRYZER.

(Filed 14 December, 1927.)

APPEAL by defendant from *Shaw, J.*, at March Term, 1927, of BUNCOMBE. No error.

George M. Pritchard for plaintiff.
Weaver & Patla for defendant.

PER CURIAM. Plaintiffs brought suit to recover the amount alleged to be due by the defendant upon a written contract executed by the parties on 27 February, 1926, under the terms of which the plaintiffs were to convey and the defendant was to purchase certain real estate therein described. Pertinent issues were submitted to the jury, and upon the verdict judgment was rendered for the plaintiffs. The controversy turned chiefly upon issues of fact which, under proper instructions, were determined against the defendant. In our opinion the case was tried in compliance with the law, and we see no valid reason for disturbing the judgment of the court.

No error.

MARY E. NEWTON, ADMX., *v.* LIGGETT & MYERS TOBACCO COMPANY.

(Filed 21 December, 1927.)

Removal of Causes—Petition—Amendments.

Amendments to a petition for removal of a cause from the State to the Federal Court does not defeat movant's right when motion to amend is made in apt time.

APPEAL by plaintiff from *Midyette, J.*, at March Term, 1927, of DURHAM. Affirmed.

Action to recover damages for wrongful death. Upon petition of the nonresident defendant, the action was removed from the Superior Court of Durham County to the District Court of the United States for the Eastern District of North Carolina, for trial.

From the order of removal, plaintiff appealed to the Supreme Court.

McLendon & Hedrick for plaintiff.
Fuller, Read & Fuller for defendant.

PER CURIAM. The summons in this action was returnable before the clerk of the Superior Court of Durham County on 19 February, 1927.

Plaintiff filed her verified complaint prior to such return day. The nonresident defendant filed its petition for removal on 3 March, 1927, prior to the expiration of the time fixed by statute for filing answer to the complaint. Upon the hearing of this petition by the clerk, it was denied. The petitioner appealed from the order of the clerk denying its petition to the judge.

This appeal was heard by the judge on 11 March, 1927, during the March Term of court. Petitioner then moved for leave to amend its petition. This motion was taken under consideration by the judge, who allowed same on 19 March, 1927. Petitioner thereupon filed its amended petition, and plaintiff duly excepted.

Upon the hearing of the amended petition, the judge signed the order of removal, and plaintiff again excepted. Plaintiff's assignments of error upon her appeal to this Court are based upon these exceptions. Neither of these assignments of error can be sustained. The motion for leave to amend was made prior to the expiration of the time to answer, and was allowed thereafter by the judge, during the term of court. For the purposes of the motion for removal, it must be taken that the amended petition was filed as of the date of the motion to amend, which was prior to the expiration of the time allowed defendant by statute to file answer to the complaint.

The amended petition is substantially the original petition as filed before the clerk. The order of removal upon the original petition is supported by *Crisp v. Champion Fibre Co.*, 193 N. C., 77, 136 S. E., 239, and by *Cox v. Lumber Co.*, 193 N. C., 28, 136 S. E., 254. The amended petition is but a restatement of the grounds for removal. The principles to be applied upon consideration of a motion for removal from the State to the Federal Court of an action pending in the State court, are well settled; they were correctly applied by the judge upon the facts set forth in the petition in this case. The order is

Affirmed.

D. R. REEVES v. ASHEVILLE CONSTRUCTION CO.

(Filed 21 December, 1927.)

Government—Actions—Negligence.

An action for damages cannot be maintained against third party using government labor when negligence alleged is that occurring in government control.

APPEAL by plaintiff from *Parker, J.*, at July Term, 1927, of BUNCOMBE. Affirmed.

Vonno L. Gudger and A. Hall Johnston for plaintiff.
Kitchin & Kitchin and Mark W. Brown for defendant.
Cocke & Cocke for State's Prison.

PER CURIAM. The defendant's, appellee's, statement of this action is as follows: "Plaintiff seeks to recover damages which plaintiff claims he sustained because the State's Prison authorities quartered convicts in the vicinity of plaintiff's home under contracts with defendant for the working of the convicts in a quarry of defendant, and for alleged nuisances committed by the convicts while under the exclusive control of the State. The court below sustained the motion for judgment of nonsuit on the ground that the defendant was not responsible for such nuisances when it had no authority over the convicts or the camp where they were quartered."

From a careful inspection of the record, we are of the opinion that the facts set forth in defendant's statement are substantially correct and the law as declared by the court below well settled in this jurisdiction. It was a hardship on plaintiff, but no legal wrong of defendant. It goes without saying that State authorities should exercise due care in the performance of governmental functions, but for the failure, in cases of this nature, no liability attaches. The plaintiff has failed to show that any liability attaches to defendant in this action. *Moody v. State Prison,* 128 N. C., p. 12. See *Jenkins v. Griffith,* 189 N. C., 633, where a wealth of authorities are cited. The judgment below is

Affirmed.

BOARD OF ROAD COMMISSIONERS OF TRANSYLVANIA COUNTY ET AL. v. BOARD OF COMMISSIONERS OF TRANSYLVANIA COUNTY ET AL.

(Filed 21 December, 1927.)

Appeal and Error—Mandamus—Record—Findings of Fact—Remand.

Sufficient facts must appear of record in appeal in proceedings for mandamus.

APPEAL by defendant from *Schenck, J.,* at Chambers, 3 September, 1927. Remanded.

Action for writ of mandamus, to compel defendant board to levy a tax sufficient to raise the amount of the budget filed with defendant board by plaintiff, for the construction and maintenance of public roads in Transylvania County during the ensuing year.

From judgment in accordance with the prayer of the plaintiff, defendant appealed to the Supreme Court.

W. E. Breece and Pless, Winborne, Pless & Proctor for plaintiff.
Ralph Fisher for defendant.

PER CURIAM. This action arises out of a controversy between plaintiff and defendant as to the amount of money required for the construction and maintenance of the public roads of Transylvania County, for the year 1927-28. Both plaintiff and defendant filed affidavits to be considered on the hearing before the judge, sustaining their respective contentions as to the facts involved in the controversy. The judge, however, has found no facts upon which to base his judgment. Serious questions of law are discussed in the briefs filed in this Court, some of which, at least, do not seem to be raised by the record. We cannot proceed to a consideration of these questions of law, in the absence of a finding by the judge of the facts involved in the controversy. *Britt v. Board of Canvassers,* 172 N. C., 797. There was no error in the denial by the judge of defendant's demand for a trial by jury, but this being an action for a writ of mandamus the judge should find the facts and embody his findings in his judgment.

The action is, therefore, remanded to the Superior Court of Transylvania County, to the end that the facts involved in the controversy may be found, and made to appear properly in the record. It is so ordered.

Remanded.

T. C. JUSTICE ET AL. v. MAYO CARLAND AND MAX POLANSKY.

(Filed 21 December, 1927.)

Deeds and Conveyances—Development of Lands—Maps—Lots—Reservation of Lot.

Effect of owner reserving certain lot for the benefit of grantees in deeds containing restrictions in developing certain lands by sale into separate lots.

APPEAL by defendants from *Shaw, J.,* at April Term, 1927, of BUNCOMBE, continuing a temporary restraining order to the final hearing.

The judgment contains the following recital of facts: "That the plaintiffs are the owners of property situated on both sides of Jeffress Avenue in Biltmore Ward, Buncombe County, State of North Carolina; that the plaintiffs derived their title by mesne conveyances from the defendant, Mayo Carland; that the defendant, Mayo Carland, in August, 1921, subdivided and platted said property into lots and laid off on said plat the said Jeffress Avenue and registered, or had registered, the said plat in the office of the register of deeds, in Book 2, page 79; that at the extreme eastern end of Jeffress Avenue on said plat and between the said eastern end of Jeffress Avenue and the eastern property line of said subdivision, the said Mayo Carland left a small strip of land, approximately 15 feet by 30 feet, and made on said small strip of land on said plat an entry in the following words: 'This space reserved by owner, Avenue stops here." That the said Mayo Carland sold all the lots on said plat with reference to said plat and referred to said plat in the deeds therefor; that he made, or caused to be made, a public announcement at a public auction of said lots on said plat, and also privately, that the small strip of land between the eastern end of Jeffress Avenue and the property east of said subdivision was reserved for the use and benefit of the purchasers of said lots of said plat and to prevent the colored people living east of said property from coming through and traversing Jeffress Avenue to the Hendersonville Road, and that Jeffress Avenue would never be extended, but would remain as shown on said plat; that the defendant Mayo Carland, on 30 March, 1927, attempted to convey said small strip of land reserved in said subdivision above mentioned and described, to his codefendant, Max Polansky, by deed which is registered in the office of the register of deeds for Buncombe County; that the defendant, Max Polansky, has developed a large subdivision immediately east of the said Carland subdivision for colored people and has attempted to extend and is threatening to extend said Jeffress Avenue across and over said small strip of land reserved in the Carland plat to his said subdivision and allow the purchasers of lots in his subdivision to use said small strip of land for a street or highway in getting to Jeffress Avenue."

Roberts, Young & Lane for plaintiffs.
Weaver & Patla for defendants.

PER CURIAM. The presiding judge was of opinion that when the defendant Carland platted and subdivided the property and indicated thereon the location and boundaries of Jeffress Avenue and the place where the avenue ended, and made announcement at the sale of the property that the reserved strip was to be kept for the use and benefit of the purchasers, Carland dedicated the reserved strip to their use and to the use of their successors in title. His Honor held that as the defendant Polansky had purchased with notice the restraining order should be continued to the hearing. We concur in the conclusion that the injunction should be continued, and affirm the judgment.

Affirmed.

JOHN QUEEN v. BLACKWOOD LUMBER COMPANY, INC., ET AL.

(Filed 21 December, 1927.)

APPEAL by plaintiff from *Harding, J.,* at October Term, 1927, of JACKSON. Affirmed.

Sutton & Stillwell for plaintiff.
Alley & Alley for defendants.

PER CURIAM. Upon petition duly filed the cause was removed for trial to the United States District Court for the Western District of North Carolina. The plaintiff excepted and appealed. The order of removal is affirmed on the authority of *Crisp v. Fibre Co.,* 193 N. C., 77; *Swain v. Cooperage Co.,* 189 N. C., 528; *Stevens v. Lumber Co.,* 186 N. C., 749. Judgment

Affirmed.

STATE v. HENRY McCOY AND JESSE LAMBERT.

(Filed 21 December, 1927.)

APPEAL by defendants from *Sink, Special Judge,* at July-August Term, 1927, of SWAIN. New trial.

Indictment for larceny. From judgment on a verdict of guilty defendants appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
McKinley Edwards for defendants.

PER CURIAM. Upon the call of this case for argument on defendants' appeal to this Court, the Attorney-General confessed error upon the record. An examination of the record discloses that there was error in the instruction of the court to the jury, which was as follows: "If you believe the evidence and are satisfied beyond a reasonable doubt, you will find defendants guilty." The evidence tended to show that defendants, in the day time, got three bushels of apples from a tree on the land of the State's witness and carried them away. It was error for the court to fail to submit to the jury, with proper instructions, the question of felonious intent. *S. v. Eunice, ante,* 409. For this error defendants are entitled to a

New trial.

T. D. BRYSON ET AL. v. J. W. MCCOY ET AL.

(Filed 21 December, 1927.)

APPEAL by defendants from *Harding, J.*, at August Term, 1927, of CHEROKEE.

Civil action to remove cloud from title, tried upon the following issues:

"1. Are the plaintiffs, T. D. Bryson, D. R. Bryson and Mary G. Tipton, heirs at law of Col. T. D. Bryson, the owners of the land described in the complaint? Answer: Yes.

"2. Is the tax deed from T. N. Bates, sheriff, to J. E. McCoy, set out in the complaint, dated 9 May, 1907, and registered 1 June, 1907, in Deed Book 19 (48) p. 95, a cloud upon plaintiffs' title to their said lands? Answer: Yes."

From a judgment on the verdict declaring defendants' tax deed void and removing same as cloud on plaintiffs' title, the defendants appeal, assigning errors.

M. W. Bell for plaintiffs.

F. O. Christopher and Edmund B. Norvell for defendants.

PER CURIAM. We held at the last term in this case, *ante,* 91, that the defendants' tax deed was void for want of sufficient description, and that the statute upon which the defendants stressfully rely, C. S., 8034, applies only to valid tax deeds and has no reference to deeds that are void. *Ex nihilo nihil fit* is one maxim that permits of no exception; it is as constant as it is self-evident. *Chemical Co. v. Turner,* 190 N. C., 471, 130 S. E., 154.

The case has been tried in accordance with our former opinion, hence the verdict and judgment will be upheld.

No error.

BLAKE H. GARRISON, BY HIS NEXT FRIEND, A. J. GARRISON, v. GRIGSBY & COMPANY ET AL.

(Filed 21 December, 1927.)

APPEAL by defendants from *Sink, Special Judge,* at August Special Term, 1927, of BUNCOMBE.

Civil action to recover damages for an alleged negligent injury, tried upon the following issues:

"1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff by his own negligence contribute to his injuries, as alleged in the answer? Answer: No.

"3. Was the plaintiff injured by the negligence of a fellow-servant, as alleged in the answer? Answer: No.

"4. What damages is the plaintiff entitled to recover? Answer: $2,000."

Judgment on the verdict for plaintiff, from which the defendants appeal.

Roberts, Young & Lane for plaintiff.
R. R. Reynolds and I. W. Cashatt for defendants.

PER CURIAM. There is no exceptive assignment of error appearing on the record which requires, or would warrant, any interference with the verdict and judgment rendered in the Superior Court. They will, therefore, be upheld.

No error.

CHARLES F. CROW AND WIFE, BERTHA B. CROW, v. CALVIN ZIMMERMAN.

(Filed 21 December, 1927.)

APPEAL by plaintiffs from *Parker, J.*, at July Term, 1927, of BUNCOMBE. Affirmed.

J. Edward Swain and R. Sidney King for plaintiffs.
Kitchin & Kitchin and Douglass & Douglass for defendant.

PER CURIAM. This was a civil action heard in the court below before his Honor, Raymond G. Parker, in which the plaintiffs were seeking injunctive relief against the defendant to prevent him from using the property known as Lots 8, 9 and 10 of Block "A," which defendant had platted and subdivided for commercial purposes. The court below was of the opinion that plaintiffs were not entitled to relief and entered judgment accordingly dismissing the action, from which the plaintiffs appealed to this Court. In this we think there was no error.

Mrs. Janie C. Kimberly owned a tract of land in Buncombe County, North Carolina, containing 8.45 acres, of which she had a plat made showing a subdivision of a portion of the tract into building lots and another portion constituting nearly one-half of the tract and fronting on a main commercial thoroughfare (State Highway No. 20, being an extension of Merrimon Avenue), not subdivided. Thereafter she sold and conveyed all the property which had been platted and divided into lots. In the deeds conveying these lots there were covenants restricting the use of thirty-five of said lots, and in the deeds conveying fifteen and a fraction lots there were no covenants of restriction. On the plat recorded by Mrs. Kimberly in the office of the register of deeds for Buncombe County in Plat Book 5, at page 8, there are forty-four numbered lots and two un-numbered lots and one tract marked "H. H. Brown," *and another tract, perhaps over one-third of her acreage, which included the locus in quo, un-numbered, not subdivided,* showing no measurements, no building lines and nothing to indicate the area of the same, and on said plat there is no suggestion that this tract is subject to any restrictions, nor does it appear that the H. H. Brown lot is made subject to restrictions, although embraced within the recorded plat. There were certain recitals, restrictions, etc., in the deed dated 14 February, 1925, and duly recorded, from Mrs. Janie C. Kimberly to plaintiffs for lots Nos. 38 and 39 and the western twenty feet of lot 40, according to the plat. The contract of sale between Mrs. Kimberly and Zimmerman *et al.* was dated 20 February, 1926, and described the property by metes and bounds and added the following: "Being a part of the land shown on plat of record in the office of the register of deeds for Buncombe County, North Carolina, in Plat Book 5, at page 8," but does not set out or refer to the restrictions. This piece of land was subdivided by defendant and the lots 8, 9 and 10 in Block "A" are the subject of the controversy.

The appeal presents the question whether the defendant in this action is bound by the restrictive covenant contained in the deed to the plaintiffs, there being no such covenant in the deed to defendant and no reference to it, nor does such covenant or reference appear in any deed constituting the defendant's chain of title, both claiming under a common source.

Defendant is not bound by the recitals, restrictions, etc., set forth in deed to plaintiffs, under the facts and circumstances of this action. *Homes Co. v. Falls,* 184 N. C., p. 426; *Davis v. Robinson,* 189 N. C., p. 589; *Bailey v. Jackson-Campbell Co.,* 191 N. C., p. 61; *Ivey v. Blythe,* 193 N. C., p. 705. The judgment of the court below is

Affirmed.

DISPOSITION OF APPEALS FROM SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Ida May Southwell, Administratrix, v. Atlantic Coast Line Railway Company. Reversed.

State of North Carolina, *ex rel.* W. D. Smith *et al.*, v. Fidelity and Deposit Company. Writ of Error. Dismissed.

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1. *Actions—Husband and Wife—Parties—Constitutional Law—Seduction Statutes.*—Under the provisions of our State Constitution, feigned issues are abolished, and actions should be brought by the real parties in interest, and under the provisions of C. S., 2513, an unmarried woman who has been seduced may, in proper instances, maintain her action for damages against her seducer without joinder of her husband as a party. *Hyatt v. McCoy*, 25.

2. *Actions—Wrongful Death—Nonsuit — Removal of Causes — Courts — Jurisdiction—Limitation of Actions.*—C. S., 160, requiring that to maintain an action for damages for a wrongful death it must be brought in a year, construed with C. S., 415, extends the time within which the action must be brought in case of nonsuit to the extreme limit of two years, and where the defendant has, under the Federal statutes, removed the cause from the State to the Federal Court, and there taken a nonsuit, and has commenced his action again in the State court, the fact that the second action between the same parties, upon the same subject-matter, was commenced in the State court more than one year after the date of the death does not bar the plaintiff's right of action. *Brooks v. Lumber Co.*, 141.

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4. *Actions—Federal Employers' Liability Act—Courts—Federal Decisions—Practice—Procedure.*—Upon the trial of an action brought in the State court to recover damages against a railroad company for personal injuries alleged to have been negligently inflicted, the decisions of the Federal Court control, but the rules of practice and procedure in the State court are followed. *Troxler v. R. R.*, 446.

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5. *Actions—Statutes—Facts Agreed.*—Where the facts are agreed upon by the parties and the trial court is thereupon by agreement to rule the law, in a suit to quiet title to lands, it differs from a controversy submitted without action under the provisions of C. S., 626. *Dowling v. R. R.*, 488.

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7. *Actions—Interveners—Burden of Proof.*—The burden of proof is upon the intervener in an action. *Fochtman v. Greer*, 674.

8. *Actions—Parties—Interveners.*—An intervener made a party and contesting the action upon its merits thereby enters a general appearance. *Kaplan v. Grain Co.*, 712.

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10. *Actions—Misjoinder—Parties—Causes of Action—Parol Trusts—Mortgages.*—Where the complaint in a suit to engraft a parol trust upon the title to lands in favor of a husband and wife, alleges that they gave a mortgage on three tracts of land, the husband having title in two of them and his wife in the other, and that the husband for himself and as agent for his wife had agreed with a third person that the latter should bid it in at the sale and hold the title in trust for them upon certain trust relations: *Held*, in a suit against the administrator of the alleged deceased trustee, the complaint was not demurrable upon the ground of a misjoinder of parties and causes of action. *Cole v. Shelton*, 741.

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ADULTERY. See Criminal Law, 16.

ADVANCEMENTS. See Agriculture, 1; Landlord and Tenant, 2.

ADVERSE POSSESSION. See Ejectment, 1; Tenants in Common, 1.

AFFIDAVIT. See Verdict, 5.

AFTERBORN CHILDREN. See Wills, 3.

AGENCY. See Bills and Notes, 11; Constitutional Law, 5.

AGREEMENT. See Appeal and Error, 3; Highways, 9; Jury, 2; Nuisance, 2; Verdict, 3.

AGRICULTURE.

1. *Agriculture—Liens—Advancements—Statutes—Overcharge — Reference —Evidence—Findings—Appeal and Error—Remand.*—In an action to recover the balance due a cropper for advancements made for the cultivation of the crop and to establish the lien provided by C. S., 2480, and referred, the referee found as a fact, that the advancements were in money, merchandise and fertilizer, that the plaintiffs had charged more than 10 per cent above the retail cash price for fertilizer of the same kind, and declared the statutory lien void under the provisions of C. S., 2483: *Held*, the action of the trial judge was erroneous in the absence of evidence that such advance price had been charged for the fertilizer, or that if otherwise the lien would necessarily be void as to the other merchandise sold. *Rhodes v. James*, 240.

AIDERS AND ABETTORS. See Instructions, 2.

ALIENATION OF AFFECTION. See Husband and Wife, 3, 4, 5, 6.

ALIMONY. See Divorce, 1.

ALLEGATIONS. See Banks and Banking, 4; Indictment, 1; Taxation, 6.

ALTERNATIVE JUDGMENT. See Judgments, 2.

AMBIGUITY. See Bills and Notes, 5.

AMENDMENTS. See Appeal and Error, 6; Evidence, 11; Highways, 15; Statutes, 1; Taxation, 4.

ANIMUS REVERTANDI. See Process, 4; Quo Warranto, 5.

ANSWER. See Pleadings, 5.

APPEAL. See Limitation of Actions, 2.

APPEAL AND ERROR. See Actions, 6; Agriculture, 1; Banks and Banking, 2, 7; Bills and Notes, 8; Certiorari, 1, 2; Costs, 2; Criminal Law, 4, 9, 13, 17, 20, 25; Courts, 3, 9, 10, 11; Divorce, 1; Ejectment, 1; Evidence, 1, 3, 13, 15; Highways, 1, 4, 7, 9; Homicides, 1, 4; Instructions, 1, 3, 4, 5, 8, 10; Intoxicating Liquor, 4; Judgments, 2, 3, 4, 5, 7, 11; Judicial Sales, 1; Jury, 5, 6, 7; Libel and Slander, 5; Master and Servant, 2; Mortgages, 6; Negligence, 20; Partition, 4, 6; Physicians and Surgeons, 1, 2; Pleadings, 9; Reference, 1; Sales, 2; Schools, 3; State Highway Commission, 1; Tenants in Common, 1; Trials, 1, 2; Vendor and Purchaser 2, Verdict, 1, 2, 6; Wills, 13.

1. *Appeal and Error—Evidence—Clerical Errors—Parol Trusts — Deeds and Conveyances—Harmless Error.*—Where the right of the judgment creditor to issue execution against the lands of the husband depends upon whether he owned the title or held it in trust for his wife, who had paid the purchase price, and the entire controversy depended thereon, an inadvertence in the issue submitted in reciting a deed of release instead of the deed in question, both containing the same description as to the lands, will not be considered as a fatal variance

APPEAL AND ERROR—*Continued.*

between the pleadings and the proof, or calling for a judgment in defendant's favor when the jury has found that the lands were held in trust for the wife. *Richert v. Supply Co.*, 11.

2. *Appeal and Error—Deeds and Conveyances — Clerical Mistakes — Descriptions—Harmless Error.*—In this case, *Held*, a clerical error made in the complaint as to the date of a certain deed, and also in the judgment by default rendered by the clerk against one defendant, is not reversible error as to the other. *Ibid.*

3. *Appeal and Error—Instructions—Requests for Instructions—Issues—Agreement of Parties—Courts.*—Exceptions to the refusal of the court to give special prayers for instruction will not be sustained when it appears on appeal that the parties had agreed that the court should answer the issues to which they were addressed as a matter of law after verdict had been rendered on the other issues, and this has been done. *Roberts v. Burton*, 19.

4. *Appeal and Error—Fragmentary Appeal—Dismissal.*—An appeal from the refusal of the trial court to confirm the amount of damages assessed by the board of appraisers for the taking of private lands for the building of a State highway by the State Highway Commission, is fragmentary, and will be dismissed as prematurely taken from an interlocutory order of the court. *Sneed v. Highway Commission*, 46.

5. *Appeal and Error—Motion to Retain Cause in Superior Court to Correct Amount of Judgment.*—Where the Supreme Court, on appeal, has allowed a motion for a new trial for newly discovered evidence after having fixed a time in which the parties may file their affidavit in support of the motion and *per contra*, the Court will not thereafter allow a motion retaining the case on its docket for the purpose of correcting the amount of the judgment. *Teeter v. Express Co.*, 172 N. C., 620, cited and approved. *Moore v. Tidwell*, 186.

6. *Appeal and Error—Objections and Exceptions—Premature Appeals — Dismissal—Pleadings—Amendments—Courts.*—Where the trial judge has allowed the plaintiff's motion to amend his complaint upon due notice, within ten days after the receipt of the certificate by the clerk of the trial court from the Supreme Court on a former appeal, sustaining a demurrer to the complaint, the procedure is, if objected to by the defendants, to note an exception and appeal from the final judgment, and an appeal otherwise will be dismissed as premature. *Morris v. Cleve*, 202.

7. *Appeal and Error—Actions—Prosecution Bond—Statutes.*—A motion to dismiss for the failure of the plaintiff to file a prosecution bond, C. S., 493, 494, made for the first time in the Supreme Court, on appeal, will be denied when it has been properly made to appear that plaintiff had filed a proper bond after the issuance of the summons. *Costello v. Parker*, 221,

8. *Appeal and Error—Trials—Burden of Proof—Reversal.*—Where a party to a civil action has the burden of proof of the issue, it is a substantial right of the other party accorded him by the law, and the erroneous placing of this burden by the trial court is reversible. *Power Co. v. Taylor*, 231.

APPEAL AND ERROR—*Continued.*

9. *Appeal and Error—Burden of Proof — Evidence — Questions and Answers.*—Where exception is taken to the judge's exclusion of evidence upon the trial, it is upon appellant to show error, and when the exception is taken to unanswered questions, the substance of the answers must be made to appear on appeal, so that the Supreme Court may pass upon its competency. *Ice Co. v. Construction Co.* 407.

10. *Appeal and Error—Instructions—Objections and Exceptions.*—An instruction will not be considered on appeal unless there has been an exception thereto duly entered. *Edwards v. Nunn*, 492.

11. *Appeal and Error—Process—Service—Publication — Attachment — Review.*—The findings of fact, supported by the evidence and approved by the judge, on motion made by special appearance, to dismiss an action on the ground that the defendant, on whom service was made by publication and attachment in case of nonresidence, C. S., 484(3), 799(2), was in fact a resident of the State having the *animus revertandi: Held*, not subject to review on appeal to the Supreme Court. *Brann v. Hanes*, 571.

12. *Appeal and Error—Transcript—Costs—Rules of Court — Printing.* — *Held*, in this case the record on appeal was much too voluminous or in excess of that required to properly present the appeal, and the appellee at whose instance it was done is taxed with the cost of mimeographing it for the excess over the sixty pages allowed by Rule 26. *Trust Co. v. Pumpelly*, 580.

13. *Appeal and Error—Constitutional Law.*—Under the provisions of our Constitution, Art. IV, sec. 8, the Supreme Court on appeal from an issue of *devisavit vel non*, involved in the trial of a caveat to a will, is confined to a consideration of assignments of error in matters of law and legal inference. *In re Will of Brown*, 583.

14. *Appeal and Error—Objections and Exceptions—Broadside Exceptions—Review.*—An exception to a judgment modifying and confirming the unmodified part of the report of the referee by the trial judge, without particularizing the error sought to be reviewed on appeal to the Supreme Court, is a broadside exception and will not be reviewed. *Thomas v. Products Co.*, 729.

15. *Appeal and Error—Referee—Modification—Courts—Evidence—Review.* —The affirmation of the referee's findings of fact by the trial judge, or a modification thereof by him, is not reviewable on appeal when supported by legal evidence. *Ibid.*

16. *Same—Questions of Law.*—Where in an action by an agent to recover commissions on goods sold under contract within a certain territory, and referred, the referee has found that the commissions were due on all goods sold within the territory, and upon supporting evidence the trial judge has found that this arrangement continued to a certain date and was then modified by the parties so that the agent thereafter was only entitled to his commissions on orders sent in by him: *Held*, the judgment based on such modification is upon a finding of fact, and is not reviewable as a conclusion of law. *Ibid.*

17. *Appeal and Error—Rules of Court—Docketing—Dismissal.*—A prisoner convicted of a capital felony, appealing *in forma pauperis*, must

APPEAL AND ERROR—*Continued.*

comply with the rules regulating the docketing of cases on appeal, and when he has not done so and fails to file the record proper and move for *certiorari*, on the motion of the Attorney-General the appeal will be docketed and dismissed.. Rule 5, 192 N. C., 841, C. S., 4654, allowing the convicted defendant to abandon his appeal in a criminal action in the court below, commented upon. *S. v. Taylor*, 738.

18. *Same—Record Proper—Motions—Certiorari—Courts—Discretion.*—The motion for a *certiorari* in the Supreme Court by appellant who has failed to docket his case in time under the requirements of Rule 5, may be allowed, in the discretion of the court, upon the docketing of the record proper and the showing as required for merit and want of laches. *Ibid.*

19. *Appeal and Error—Record—Review.*—The case on appeal to the Supreme Court will be reviewed upon the record, though it appears that the case was agreed upon by the parties and not settled by the judge presiding at the trial. *Rose v. Construction Co.*, 742.

20. *Appeal and Error—Objections and Exceptions—Parties—Causes of Action—Misjoinder—Statutes.*—In order to review the action of the referee in permitting amendments to pleadings and the making of new parties, C. S., 576, and contending successfully on appeal that there was a misjoinder of parties and causes of action, it is required that the appellant should have excepted in apt time and have preserved his exceptions or they will not be considered on appeal to the Supreme Court. *Sheffield v. Alexander*, 744.

21. *Appeal and Error—Record—Case.*—Where the case on appeal has not been settled by the trial judge, but by agreement of counsel, that appearing in the record will control. *Cogdill v. Hardwood Co.*, 745.

22. *Appeal and Error—Nonsuit.*—A judgment as of nonsuit will be sustained in an action by a tenant for damages resulting from a defect in the premises rented unless it is shown that the defect was peculiarly within the knowledge of the landlord, and could not have been discovered by the tenant upon reasonable inspection. *Tucker v. Yarn Mill Co.*, 756.

23. *Appeal and Error—Evidence Withdrawn From Jury—Instructions—Objections and Exceptions.*—The admission of improper or incompetent evidence, when ordered stricken out by the court, does not constitute reversible error, especially when the jury is particularly instructed not to consider or be influenced by it. *Hyatt v. McCoy*, 760.

24. *Appeal and Error — Instructions — Excerpts From Charge.* — Excerpts from the judge's instructions to the jury will not be held for error, if construed in connection with related parts of the entire charge, no error has been committed. *Ibid.*

25. *Appeal and Error—Objections and Exceptions — Evidence — Harmless Error.*—The introduction of evidence on the trial of the action, without objection, cures the erroneous previous admission of the same evidence. *Keith v. Kennedy.*

26. *Appeal and Error—Divided Court—Law of the Case.*—Where one of the Justices of the Supreme Court takes no part in the decision of the

APPEAL AND ERROR—*Continued.*

case, and the other four are equally divided in their opinion, the judgment of the lower court is the law of the case, but not to be regarded as a precedent. *Julian v. Winston-Salem*, 807.

27. *Appeal and Error—Harmless Error—Instructions.*—A party cannot take advantage of an error committed in his favor. *Sparks v. Sparks*, 809.

28. *Same.*—An instruction of the lower court will not be held for error unless it is made to appear that a different verdict might have been rendered. *Ibid.*

29. *Appeal and Error—Mandamus—Record—Findings of Fact—Remand.*—Sufficient facts must appear of record in appeal in proceedings for mandamus. *Road Comrs. v. Comrs. of Transylvania*, 818.

APPLICATION. See Insurance, 4; Physicians, 2.

AGREEMENT OF COUNSEL. See Courts, 11.

ARREST. See Damages, 2.

ARREST OF JUDGMENT. See Judgments, 8.

ASSAULT. See Criminal Law, 1.

ASSAULT AND BATTERY. See Criminal Law 6, 8.

ASSESSMENTS. See State Highway Commission, 1; Municipal Corporations, 2.

ASSUMPTION OF RISKS. See Master and Servant, 9.

ATTACHMENT. See Appeal and Error, 11; Process, 1, 2, 4, 5.

ATTORNEY AND CLIENT. See Evidence, 12.

AUTOMOBILES. See Courts, 6, Negligence, 6, 8, 16, 26; Railroads, 3.

BANKS AND BANKING. See Bills and Notes, 11; Counties, 1; Evidence, 20; Equity, 5; Trusts, 1; Witnesses, 1.

1. *Banks and Banking—Special Deposits—Contracts—Trusts—Liens—Receivers—Depositors—Debtor and Creditor.*—Where a bank receives a deposit of a check upon an agreement with the depositor that it was immediately to be checked against in part for the payment of a lien upon land, and the check so deposited has been paid in due course by the bank upon which it was drawn, to deposit to the amount so agreed is a special deposit, and the agreement impresses a trust upon the assets of the bank giving it priority in payment over the general deposits, which may be followed into the receiver's hands. and as to the balance, the ordinary relation of debtor and creditor exists. *Corporation Commission v. Trust Co.*, 125.

2. *Banks and Banking—Receivers—Trust Funds — Priorities — Parties—Appeal and Error.*—The surety on the bond of guardians, etc., who have deposited moneys in a bank since becoming insolvent, may not alone successfully petition the court in proceedings for dissolution of the bank brought by the Corporation Commission to have the funds so deposited declared a preference to the general creditors, and have the receiver accordingly pay them, without making the guard-

BANKS AND BANKING—*Continued.*

ians, etc., parties to the proceedings, there being otherwise a want of necessary parties to the determination of the matter. *Corporation Commission v. Trust Co.*, 239.

3. *Banks and Banking—Bills and Notes—Payment—Bank Purchasing Its Own Shares of Stock—Statutes—Consideration—Collateral.*—A bank may not cancel a note made to it in consideration of shares of its stock delivered to it by the maker of the note he had purchased from another, it not appearing that the maker of the note thus canceled was insolvent, or that the transaction was necessary to prevent loss to the payee bank, and payment so made is not a valid defense in the hands of another bank to which the note had been endorsed before maturity by the payee bank as collateral security. 3 C. S., 220(t); C. S., 224; Laws of 1921, ch. 4, sec. 45. *White v. Whitehurst*, 305.

4. *Banks and Banking—Insolvency—Depositors—Actions—Individual Liability of Officers—Pleadings—Allegations—Demurrer—Statutes.* — In order for the depositor in a bank since becoming insolvent and in the hands of a receiver, to maintain an action personally against the individual officers of a bank for permitting the deposits to be received, it is necessary, among other things, to allege and prove the insolvency of the bank at the time the deposits were made, and the allegation that it was either insolvent then or the misconduct of the officials afterwards caused its insolvency, is insufficient, the alternative of the allegation being a wrong to the bank itself which may be sued upon by its receiver afterwards. 3 C. S., 224(g). *Wall v. Howard*, 310.

5. *Banks and Banking—Bills and Notes—Checks—Collection—Currency.*—A bank taking a check for collection is ordinarily required to accept therefor only money or currency in the usual and established methods among banks in such instances. *Barnes v. Trust Co.*, 371.

6. *Same—Negligence—Clearing House—Customers—Knowledge and Consent of Depositors.*—Where a depositor at a bank places therein a cashier's check of another bank for collection, and both the depositor and the bank knew that the payee bank could not pay it, and the collecting bank with the depositor's authority used the method of the clearing house in such instances in receiving a check for the amount, and proceeded with due diligence to collect it: *Held*, the bank of deposit for collection is not liable to its depositor as a matter of law for the nonpayment of the clearing house check it had thus received, it coming within the exception to the general rule of law. *Ibid.*

7. *Banks and Banking—Bills and Notes—Worthless Checks—Statutes—Partnership—Evidence—Instructions—Appeal and Error.*—Upon the trial under indictment for violating C. S., 4283, making it a misdemeanor to obtain property in return for a worthless check, etc., the evidence tended to show that the check in question was signed in the name of a certain cotton company by the defendant, and was conflicting as to whether the defendant was a member of the concern: *Held*, the question as to whether the defendant was a member of the company when he drew the check in question was not necessarily decisive of his guilt, and an instruction to find him guilty if the jury should find from the evidence he was not a partner, was reversible error. *S. v. Anderson*, 377.

BANKS AND BANKING—*Continued.*

8. *Same—Criminal Intent—Principal and Agent—Burden of Proof—Good Faith.*—The burden of proving the guilt of defendant in violating C. S., 4283, the worthless check statute, is on the State, and where the check in question has been signed by him in the name of a certain firm and there is evidence tending to show that other checks similarly signed had been paid, with further evidence that defendant's authority to sign such checks had been revoked, the burden of proving defendant's guilt is on the State, and raises the question as to the defendant's good faith for the jury to determine. *Ibid.*

9. *Banks and Banking—Merger—Voluntary Dissolution.*—When an existing bank is absorbed by another bank, it is in effect, a voluntary dissolution of the bank thus taken over. *Comrs. of Greene v. Bank*, 475.

10. *Same—Statutes—Liability of Shareholders—Contracts.*—The additional liabilities of a stockholder in a National bank to that ordinarily existing as to shareholders in other corporations, arises by operation of a statute at the time the stock was purchased, as secondary to the general liabilities of the bank, and not as express or implied promise to pay by contract. *Ibid.*

11. *Same—Courts—Jurisdiction—Federal Courts.*—A bank organized under the Federal laws whether it has entered into liquidation voluntarily or not, is under the control of the Comptroller of the Currency of the United States, and the question of the enforcement of the additional liability of its stockholders is one falling alone within the jurisdiction of the Federal Courts. *Ibid.*

12. *Banks and Banking—Action—Election of Remedies—Duty.*—Although the relation of debtor and creditor exists between a bank and a depositor, yet a bank is a *quasi*-public corporation and is under duty to pay the checks of a depositor when the depositor has sufficient funds in the bank, and failure to do so gives rise to an action in tort or one on contract, at the election of the plaintiff. *Woody v. Bank*, 549.

13. *Same—Tort—Damages.*—A bank is under obligation to its depositor to pay his checks on presentation when his deposit in the bank is sufficient, and unless protected by a provision of a statute, is liable in tort for its failure to do so for nominal damages at least, and in proper instances for substantial damages naturally flowing therefrom when not too speculative or remote. *Ibid.*

14. *Banks and Banking—Action—Statutes—Question for Jury.*—3 C. S., 220(m) providing that actual damages only shall be awarded against a bank for the nonpayment of a check covered by sufficient funds, applies, by the language of the statute, only where the nonpayment is not through mistake or error, and without malice, and where the complaint alleges that the nonpayment was wrongful and malicious the statute does not apply, unless the jury find the issue against the plaintiff. *Ibid.*

15. *Banks and Banking—Parties—Exchange—Actions—Statutes.*—A bank may maintain its action against another bank to enforce by mandatory injunction its payment of the exchange charges drawn through the one on the other, allowed by the statute, 3 C. S., 220(z), and the fact that the plaintiff is a national and the defendant a State bank, does not vary this principle, and 3 C. S., 220(dd) does not apply. *Bank v. Bank*, 720.

BANKS AND BANKING—*Continued.*

16. *Same—"Remittance"—Words and Phrases.*—The exchange or collection charges authorized by 3 C. S., 220(z), apply only to "remittances" covering checks, and where checks, etc., are sent to a bank in the same town with the bank on which they are drawn, for which either money or bank entries are required, such transactions do not fall within the meaning of the term "remittances" which will entitle the bank on which they are drawn to the exchange charges specified in the statute. *Ibid.*

BENEFICIARIES. See Insurance, 3; Wills, 2, 8.

BENEFITS. See Infants, 1.

BEQUESTS. See Wills, 14.

BETTERMENTS. See Mortgages, 5.

BIDS. See Sales, 1.

BILLS AND NOTES. See Banks and Banking, 3, 5, 7; Contracts, 4; Damages, 3; Equity, 6; Evidence, 26; Mortgages, 6.

1. *Bills and Notes—Instructions—Evidence—Questions for Jury.*—Where there is evidence that the plaintiff was a holder in due course for value of a negotiable note, the subject of the action, acquired before maturity without notice of an infirmity, and also that the note was a part of an advertising contract from which it had been detached, thus altering its negotiable character so as to make it void in the hands of the plaintiff, a peremptory instruction in plaintiff's favor is reversible error, there being more than a scintilla of evidence for the defendant for the jury to determine. *Combs v. Cooper*, 203.

2. *Bills and Notes—Fertilizer—Contracts—Renewal—Failure of Consideration—Waiver — Defenses.* — Where the purchaser of fertilizer has given his note for the purchase price, and after the crops upon which it has been used have been gathered and the result of the use of the fertilizer seen, he may not give a renewal note for the amount due and thereafter resist recovery thereon, upon the ground that the fertilizer was worthless, and did not come up to contract, and therein there was a failure of consideration. *Barco v. Forbes*, 204.

3. *Bills and Notes—Indorser—Promise to Extend Time—Contracts—Consideration.*—A promise of the payee of a note to an indorser after maturity of a promissory note to extend time for the payment of the note three or four years in consideration of the indorsement, is a sufficient consideration to enforce the promise between the parties to the agreement. *Fertilizer Co. v. Eason*, 244.

4. *Same—Parol Contracts — Written Contracts — Evidence.* — Where one indorses a negotiable instrument after maturity upon a parol agreement with the payee that he will extend the time of payment of the note three or four years, the agreement is not required to be in writing, and being independent of the written note, does not fall within the rule that parol evidence will not be admitted to vary, alter or contradict the terms of a written contract. *Ibid.*

5. *Same—Extension of Time—Definiteness.*—An indorsement upon a promissory note made after maturity upon a parol agreement that the

BILLS AND NOTES—*Continued.*

payee will extend the time of payment from that therein specified, for three or four years, is not so indefinite as to the time extended as to render the agreement unenforceable in that respect. *Ibid.*

6. *Same—Limitation of Actions.*—Where there is an extension of time given the maker of a note for three or four years in consideration of an indorsement made after the maturity of the instrument, the statute of limitations does not begin to run at least within the three years, and an action brought within a few months thereafter will not be barred. *Ibid.*

7. *Bills and Notes — Consideration — Criminal Law — Threats — Public Policy—Actions.*—Where the plaintiff has obtained the signature of defendant on a promissory note jointly with his brother, under a threat to have the latter indicted at once for giving plaintiff an unhonored check on the bank, without duress, and the plaintiff in consequence has abandoned a suit in which attachment proceedings had been issued against the defendant's brother and another in whose possession the property attached was at the time: *Held*, the bare threat against the defendant's brother did not amount to compounding a felony or stifling a criminal prosecution, and the note itself being founded upon a sufficient legal consideration is valid and enforceable against the defendant. *Johnson v. Pittman*, 298.

8. *Same—Pleadings—Issues—Instructions — Appeal and Error.* — Issues should arise from the pleadings in the cause, and where it is alleged in the answer that the note sued on was obtained under an agreement that was unlawful and the note therefore unenforceable, the submission of an issue as to whether the note in suit was obtained from the defendant to prevent a criminal prosecution is insufficient, did not arise from the pleadings and is reversible error, and an instruction predicated thereon is also error. *Ibid.*

9. *Bills and Notes—Negotiable Instruments—Corporations—Contribution —Indorsers—Equity—Receivers—Parties.*—Where one of the indorsers of a note of a corporation taking over the business of another has been legally required to pay the note, and sues his coindorsers for contribution, and the answer alleges that the plaintiff had knowingly and fraudulently concealed the financial condition of the purchased corporation, and that he had failed under his agreement to properly attend to the financing of the purchasing corporation, and that the defendant's indorsement was thus procured by the plaintiff's fraud: *Held*, a sufficient defense is alleged to raise the issue for the jury, and overthrow the plaintiff's demurrer; and the position is untenable that the receiver of the corporation making the note and since declared insolvent can only maintain the action in his representative capacity. *Harvey v. Oettinger*, 483.

10. *Bills and Notes—Statutes.*—A check is a bill of exchange drawn on a bank, payable on demand, C. S., 3167; further defined as a written order on a bank or banker, purporting to be drawn against a deposit of funds, for the payment at all events of a sum of money to a certain person therein named, or to him or his order, or to bearer, and payable on demand. *Woody v. Bank*, 549.

BILLS AND NOTES—*Continued.*

11. *Bills and Notes—Drafts—Banks and Banking—Agency for Collection—Principal and Agent—Due Course — Questions for Jury.* — Where a bank accepts for deposit a draft drawn for goods sold and delivered by common carrier, reserving the right to charge the draft back to his depositor if not paid, it is an agency for collection and not a purchaser; and when the draft has been paid to the local bank of the drawee, who afterwards brings action against the consignor for damages for breach of contract of sale, upon conflicting evidence the question is for the jury. *Kaplan v. Grain Co.*, 712.

BILL OF PARTICULARS. See Criminal Law, 15; Pleadings, 7.

BONDS. See Appeal and Error, 7; Constitutional Law, 2; Mortgages, 2; Schools, 1, 2; Statutes, 1, 2, 5; Taxation, 4, 10, 14, 16.

BOOKS. See Witnesses, 1.

BOUNDARIES. See Deeds and Conveyances, 7; Evidence, 25; Reference, 2; Trespass, 1.

BRIDGES. See Negligence, 11.

BUILDING CONTRACTS. See Contracts, 3.

BURDEN OF PROOF. See Actions, 7, 8, 9; Appeal and Error, 8, 9; Banks and Banking, 8; Contracts, 3; Criminal Law, 9, 21; Ejectment, 1; Evidence, 26; Fraud, 2; Landlord and Tenant, 1; Negligence, 3, 9; Quo Warranto, 2; Tenants in Common, 1.

BURNINGS. See Evidence, 20.

CANCELLATION. See Insurance, 1.

CAPITAL FELONY. See Homicide, 4; Judgments, 11.

CARRIERS.

1. *Carriers of Goods—Common Carriers—Railroads—Negligence — Damages—Loading Cars—Connecting Lines of Carriage—Evidence.*—The defective loading of a carload shipment by the initial carrier by rail does not render the delivering carrier, in a connecting line of transportation liable in damages to the consignee, who was injured thereby in unloading the same, when there is nothing in the external appearance of the car to put the delivering carrier upon notice of the defects, which were discoverable only upon the door of the car being opened. *Tucker v. R. R.*, 496.

2. *Carriers—Railroads—Side-Tracks — Repair — Damages — Contracts.* — Where a railroad company has constructed a side-track upon the lands of a milling corporation without an order of the Corporation Commission to do so, C. S., 1044, or an agreement with the owner to keep the track in repair, for the exclusive benefit of the owner in unloading its coal from an elevation or chute, and the same has become dangerous in placing the cars for unloading, the railroad company is not liable for damages in an action to recover the cost of such repairs expended by the owner, upon an agreement that thereby his action would not be prejudiced. The effect of an order

CARRIERS—*Continued.*

by the Director General of Railroads under war control discussed by plaintiff, but not presented by the record or decided in this appeal. *Aileen Mills v. R. R.*, 647.

CASHIERS. See Evidence, 20.

CAUSE OF ACTION. See Actions, 6; Appeal and Error, 20.

CAVEAT. See Courts, 11; Jury, 3; Wills, 7, 13.

CAVEAT EMPTOR. See Deeds and Conveyances, 10.

CERTIORARI. See Appeal and Error, 18; Constitutional Law, 10; Courts, 10.

1. *Certiorari—Appeal and Error—Courts—Discretion—Fault of Movant.*—It is within the discretion of the Supreme Court to allow the issuance of the writ of *certiorari* to bring up a case before it for review and only for good or sufficient cause, as where the failure to perfect the appeal is due to some error or act of the court or its officers, and not to any fault or neglect of the movant or his agents. *Womble v. Gin Co.*, 577.

2. *Ceritorari—Appeal and Error—Courts—Discretion—Laches—Merit—Statutes—Rules of Court—Dismissal.*—The granting of a *certiorari* by the Supreme Court to bring up for review a case on appeal, lies within the discretion of the court upon a showing made by the appellant that he himself had complied with all the requirements to get the case up and docketed in time to be heard under the rules of the court, that the defense was meritorious, and that he had not been guilty of any laches therein, but that the delay was attributable to the proper officials of the court in which the case had been tried. C. S., 643, 644. *S. v. Angel*, 715.

CHARGE. See Instructions.

CHECKS. See Banks and Banking, 5, 7; Constitutional Law, 13; Statutes, 6.

CHILD. See Negligence, 12.

CIRCUMSTANTIAL EVIDENCE. See Evidence, 4.

CITIES AND TOWNS. See Constitutional Law, 7; Eminent Domain, 1; Government, 1; Municipal Corporations, 1, 2; Negligence, 2; Removal of Causes, 1; Taxation, 16; Waters and Watercourse, 1.

CLEARING HOUSES. See Banks and Banking, 6.

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1. *Constitutional Law—Contracts—Vested Rights—Retroactive Statutes—Statutes—In Pari Materia.*—Where a valid act authorizing a county to issue bonds has been passed in accordance with the provisions of the State Constitution, Art. II, sec. 14, leaving out the requirement that the question must first be submitted to the qualified voters, and another act ratified a few days later makes this requirement, the two acts will be construed *in pari materia*, and the later as not having a retroactive effect, and the county does not acquire a vested right under the first ratified act. Const., Art. I, sec. 17. *Graham County v. Terry*, 22.

2. *Constitutional Law—Schools—Taxation—Bonds—Vote of the People.*—Where a legislative enactment has been duly transmitted through the proper legislative channels to the President of the Senate and the Speaker of the House of Representatives, and is filed with the Secretary of State in accordance with the requirements of law, after their signatures have thereon been placed, the passage of the act in accordance with the provisions of Art. II, sec. 23, of the Constitution of North Carolina is irrebuttably presumed, except where it falls within the provisions of Art. II, sec. 14, thereof, the latter requiring that it be passed on separate days with the aye and no vote, and then only the appropriate Journals of each branch of legislation may alone be shown in evidence to disprove that it was not so passed, and was therefore invalid. *Frazier v. Comrs. of Guilford*, 49.

3. *Same—Statutes—Ratification—Presumptions — County Finance Act.*—Where an act has been passed by the Legislature pledging the faith and credit of the State, or of a county, etc., in accordance with Art. II, sec. 14, of the State Constitution, after adopting amendments, with respect to which the Journals are silent to the manner of their adoption, the irrebuttable presumption is that the amendments were as to immaterial matters when the act itself has been ratified in accordance with our State Constitution, Art. II, sec. 23, and unofficial memoranda attached by a rubber band to the engrossed act and not therein referred to or therein incorporated, are incompetent as evidence *per contra. Ibid.*

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4. *Same—Notice—Newspapers—Sufficient Publication.*—The provisions as to notice given to taxpayers, etc., required by sec. 10, Municipal Finance Act, of an opportunity to be heard before the county may issue bonds for various purposes, is sufficiently complied with if the several orders of the county commissioners are published in the same advertisement and a date and place fixed for passing upon the objections made, if any, separately placed in the publication and distinctly referring to each of the separate purposes. *Ibid.*

5. *Same—Counties—Agencies of Government.*—While the issuance of bonds for school purposes is not for a necessary expense within the contemplation of the Constitution, and ordinarily requires the submission of the question to the voters for the issuance of county bonds for the purchase of additional lands or equipment for established public schools, this is not required when the commissioners proceed under the County Finance Act, which empowers counties, as direct sub-agencies of the State Government, to provide public school facilities for the children of the State for a term not less than six months of each year. Const., Art. IX, sec. 2. Art. VII, sec. 7, does not apply. *Ibid.*

6. *Same—Statutes—Length of School Term—Legislative Powers.*—Our State Constitution, having required a public school system of the State to have at least six months terms in each year, leaves it to the discretionary power of the Legislature to fix terms in excess of that period. Const., Art. IX, sec. 3. *Ibid.*

7. *Constitutional Law—Taxation—Statutes—Municipal Corporations—Cities and Towns—Zoning Districts—Discrimination in Ad Valorem Tax.*—An act authorizing the division of a city into several zones for the purpose of fixing an *ad valorem* basis of real estate for taxation, uniform within each zone, but classified in accordance with density of population, character of buildings, etc., violates the mandatory provisions of our Constitution that within its corporate limits all taxable property shall be by a uniform rule and *ad valorem.* Const., Art. V, sec. 3; Art. VII, sec. 9. *Anderson v. Asheville,* 117.

8. *Constitutional Law—Libel—Newspapers—Retraxit—Statutes.*—C. S., 2429, 2430, and 2431, providing that a newspaper publishing a libel may avoid, under certain conditions, the payment of punitive damages is not discriminatory, but a constitutional enactment. Const. of North Carolina, Art. I, secs. 20, 35. *Pentuff v. Park,* 146.

9. *Same—Actual Damages—Freedom of the Press.*—The "actual damages" recoverable in a suit for libelous publication by a newspaper in the event of a retraxit, allowed by the statute, is for pecuinary loss, direct or indirect, or for physical pain and inconvenience, and a recovery therefor does not abridge the freedom of the press, as inhibited by our Constitution, Art. I, sec. 20. *Ibid.*

10. *Constitutional Law—Criminal Law—Certiorari—Review.*—Where the Superior Court judge has declared a sentence by a preceding judge void as an alternative judgment in a criminal prosecution, and has therefore disregarded it, the Supreme Court is authorized under our Constitution empowering it among other things "to issue any

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remedial writs necessary to give it general supervision and control over the proceedings of the inferior courts" to issue a writ of *certiorari* to bring the question before it upon the State's application therefor. *S. v. Schlichter*, 277.

11. *Constitutional Law—Statutes—Interpretation—Courts.*—The courts will not declare a statute void as inhibited by the Constitution unless the violation of the Constitution is so manifest as to leave no room for a reasonable doubt. *Comrs of McDowell v. Assell*, 412.

12. *Constitutional Law—Statutes—Police Powers—Public Evil—Intent.*—As a part of the exercise of its police power, inherent in a State, the Legislature, when not prohibited by the State or Federal Constitution, may validly enact a statute to suppress a far reaching existing potential evil, making the commission of the prohibited act a misdemeanor, and punishable as a crime against the State, without reference to whether it was done with a fraudulent intent. *S. v. Yarboro*, 498.

13. *Same—Worthless Checks.*—Our statute generally known as the Worthless Check Law, making it a misdemeanor for one to draw a check on a bank knowing that he had no funds on deposit therein sufficient to meet it or having made arrangement with the bank for its payment on presentment, is a valid exercise by the State of its police powers, the offense being the commission of the act prohibited by the statute, and not an imprisonment for debt prohibited by our State Constitution. Article I, sec. 16. *Ibid.*

14. *Constitutional Law — Federal Constitution — Judgments — Faith and Credit—Fraud.*—The provisions of the Federal Constitution requiring that a State shall give full faith and credit to the judicial proceedings of every other State, Article IV, sec. 1, does not preclude the inquiry as to whether the judgment in question is impeachable for fraud in certain instances. *Ring v. Whitman*, 544.

15. *Same—Trials—Estoppel.*—Where a judgment of another State is sued on in this State, the courts will not inquire into matters of fraud or other defense which were within the scope of the inquiry of the action in which the judgment had been rendered. *Ibid.*

16. *Same—Questions of Law—Trials.*—An allegation that plaintiff procured the judgment in another State sued on here, in a form and manner to obtain a judgment by default when there were no facts to warrant the action, is tantamount to saying that the judgment was erroneous in law, within the purview of the action brought therein. *Ibid.*

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1. *Contracts — Independent Contractor — Questions of Law — Courts.* — Whether one employed to erect a building is an independent contractor is a question of law to be determined from the written contract. *Drake v. Asheville*, 6.

2. *Contracts—Written Instruments—Evidence—Parol Evidence — Statute of Frauds—Fraud—Principal and Agent.*—Where the contract for the sale of a home electric-lighting machine and fixtures is in writing and expressly excludes all verbal representations made by the seller's agent not therein contained, evidence in behalf of the purchaser as to the cost of operation not contained in the written instrument is a modification or variance thereof, and evidence thereof alone is properly excluded for that reason, and also for being merely promissory of what the machine sold would do in the future, and standing alone is insufficient to invalidate the contract itself as being fraud in the factum. *Colt v. Conner*, 344.

3. *Contract — Building Contracts — Substantial Compliance — Burden of Proof.*—Where damages for a breach of a builder's contract are sought in an action, and the breach is denied, the burden of proof is on the plaintiff to show that the contract has not been substantially complied with by the defendant, under conflicting evidence. *Ice Co. v. Construction Co.*, 407.

4. *Contracts—Parol Evidence — Evidence — Bills and Notes—Renewals—Mortgages—Liens.*—Parol evidence is competent to show that the original note, secured by a mortgage on lands, was several times renewed, and that the note in suit was the last of the series, it being of matters not embraced in the written part of the transaction, and when so established the time of the making of the original mortgage note will give the mortgagee priority of lien over a later docketed judgment. *Edwards v. Nunn*, 492.

5. *Contracts—Pleadings — Evidence — Actions — Public Policy — Government.*—Where the complaint declares upon one contract under which plaintiff claims compensation for services rendered, he may not recover upon a different contract not alleged in the complaint relating to the same subject-matter, the probater without the *allegata* being vitally defective. As to whether the contract in this case to induce public officials to enter into it in behalf of the United States government, was *contra bonos mores* or against public policy, is not decided. *Anderson v. Chiles*, 694.

6. *Contracts—Damages—Evidence—Questions for Jury.*—In this action to recover the plaintiff's profits on cutting cord wood at a certain price per cord within a limited time, evidence of the plaintiff's preparations and the prosecution of his work, and the number of trees upon the *locus in quo*, was sufficient to sustain the verdict and judgment thereon in his favor. *Maney v. Extract Co.*, 736.

CONTRADICTION. See Evidence, 10, 15.

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CONVICTION. See Criminal Law, 8.

CORPORATIONS. See Bills and Notes, 9; Judicial Sales, 1.

1. *Corporations — Officers — Contracts — Fraud—Voidable Contracts.*—A contract, made and entered into between two corporations by the president of both, who is a director and stockholder in each, is not void but voidable, depending upon whether the contract was made in good faith and for a sufficient consideration, and one of these corporations who seeks to have it set aside upon the grounds that the other had received an unfair advantage, has the burden of proof. *Cotton Mills v. Knitting Co.*, 80.

2. *Same—Shareholders—Ratification.*—Where a corporation has entered into a contract with another corporation, through one who is the president, a director and stockholder in both, and in its action it is established that the other has received an undue advantage, it may not recover damages when it is made to appear that by its conduct, or otherwise, its own stockholders had ratified and approved the contract after knowing its terms and receiving the benefits. *Ibid.*

3. *Same—Partial Performance of Contract—Damages.*—Where two manufacturing corporations have entered into the performance of a contract for the exchange of certain machines, and the exchange is partly made, but as to some of the machines it cannot be carried out for the fact that they had been sold to others, the action, to that extent, sounds in damages. *Ibid.*

CORRECTION. See Highways, 12; Instructions, 3.

CORROBORATION. See Criminal Law, 7.

COSTS. See Appeal and Error, 12.

1. *Costs—Actions—Suits — Equity — Statutes.* — An action upon contract sounding in damages is one at law, and the costs are taxable against the losing party, C. S., 1225, and the principle involved in certain proceedings in equity, where this matter lies within the discretion of the trial judge, C. S., 1243, is not applicable. *Cotton Mills v. Knitting Co.*, 80.

2. *Costs—Stenographer's Fees—Reference—Evidence—Findings—Courts—Appeal and Error.*—Where the losing party in the action moves the clerk of the court to recall execution under judgment on the ground of excessive cost taxed for stenographer's fees, it is required of him, upon reference made, to appear and show that the charge was excessive, and failing to appear and offer evidence, the referee's finding and approval of the court below will be sustained on appeal to the Supreme Court. *Reeves v. Marks*, 357.

COUNSEL. See Jury, 2.

COUNSEL FEES. See Divorce, 1.

COUNTERCLAIM. See Actions, 3; Trials, 1.

COUNTIES. See Constitutional Law, 3, 4; Schools, 1; Statutes, 1, 2, 5; Taxation 4, 6, 10, 14, 20, 25.

1. *Counties—County Treasurer—Banks and Banking—Statutes — Depositories—Principal and Agent—Deposits.*—Where a county authorized by statute has appointed a bank as its fiscal agent to perform the duties of the treasurer for the county requiring a bond for the faithful performance of such duties, the surety on the bond is liable only for the proper performance of these duties of its principal. *S. v. Bank*, 436.

2. *Same—Interest—Loans.*—A local bank acting under a valid appointment to perform the duties of a county treasurer, as the fiscal agent of the county, is not required by C. S., 1393, to pay interest on the deposits of county funds thus received by it, and the surety on its bond is not liable for the failure of the special depository to charge itself interest on the deposits except when the bank has loaned the funds out to third parties. *Ibid.*

3. *Same—Roads and Highways — Deposits — Special Depositories — Malfeasance.*—Where a local bank has been lawfully appointed to perform the duties ordinarily performed by the county treasurer, and has also been appointed as a special depository for the proceeds of sale of an issue of bonds for highway construction upon which interest is required to be paid, C. S., 3655, in this dual capacity the surety on its bond for the faithful performance by the bank of the duties of county treasurer is not liable for the failure of the bank to collect interest on the funds received by it from the sale of the highway bonds, as such was not in contemplation of the surety bond. C. S., 3650. *Ibid.*

COUNTY COMMISSIONERS. See Highways, 11, 12.

COUNTY TREASURER. See Taxation, 9.

COURTS. See Actions, 2, 4; Appeal and Error, 3, 6, 15, 16, 18; Banks and Banking, 11; Certiorari, 1, 2; Constitutional Law, 11; Contracts, 1; Costs, 2; Criminal Law, 15, 25; Damages, 1; Deeds and Conveyances, 6; Eminent Domain, 2; Judgments, 10; Jury, 1, 2, 7; Limitation of Actions, 2; Partition, 2, 6; Physicians and Surgeons, 2; Pleadings, 9, 11; Process, 2, 5; Railroads, 1, 2; Telegraphs, 1; Vendor and Purchaser, 1.

1. *Courts—Jurisdiction—Justices of the Peace— Waiver — Constitutional Law.*—Where the defendant is sued on two accounts before a justice of the peace separately stated, each appearing to be in amount coming within his jurisdiction, but together exceeding it, by his appearing and acknowledging his liability for the sum total he thereafter waives his right on appeal to set up the defense that in fact the two accounts were but one, and he may not insist that the judgments rendered against him by the justice were unconstitutional and void for the want of jurisdiction. Const. of N. C., Art. IV, sec. 27. *Honig v. Hawa*, 208.

2. *Courts—Constitutional Law—Statutes—Emergency Judges—Governor—Commission—Issues.*—While our Constitution, Art. IV, sec. 11, provides for the appointment of emergency or special judges by statute,

COURTS—*Continued.*

and our statute confers the power of their appointment upon the Governor under the restrictions of the Constitution that it may be done when the judge assigned thereto, by reason of sickness, disability or other cause, is unable to attend and hold the court, and when no other judge is available, the validity of the trial for a homicide during the designated term may not be questioned by the defendant upon his affidavit filed subsequent to the trial, raising an issue as to whether the resident judge of the district was available at the time of the trial. *S. v. Graham*, 459.

3. *Same—Appeal and Error.*—Where the prisoner tried for the commission of the capital offense of murder at a term of court held by an emergency or special judge appointed by the Governor under the provisions of our statute, has attempted to raise an issue as to the validity of the trial by reason of the availability of the resident judge to hold the term, by affidavit made by him for the first time after his conviction, no question of law or legal inference is raised as to matters of error upon the trial itself, which comes within the power conferred by our Constitution, Art. IV, sec. 8. *Ibid.*

4. *Same—De Jure—De Facto.*—Where the emergency or special judge holds a term of court under commission from the Governor, pursuant to constitutional and statutory authority, he is in the exercise of his office as a matter of right. *Ibid.*

5. *Courts—Clerks of Court—Jurisdiction—Executors and Administrators—Judgments—Collateral Attack.*—Except when the clerk of the Superior Court having jurisdiction of the issuance of letters of administration issues them, when the party is not dead, no jurisdictional fact is raised, and where he has found as a fact before issuing the letters that he died domiciled in his county according to the statute, C. S., 1(1), the fact of his domicile cannot be collaterally assailed. *Holmes v. Wharton*, 470.

6. *Same—Actions—Automobiles—Negligence.*—Where the plaintiff sues to recover damages caused by the negligent driving of defendant's automobile on a highway, declarations of the deceased tending to show that his death was caused by defects in the auto truck he was driving at the time and not by the negligent driving of defendant's automobile, are incompetent as *pars res gestæ*, when made after the injury was received by him which caused his death. *Ibid.*

7. *Same—Trusts—Evidence—Declarations Against Interest.*—Where an administrator sues to recover damages for the wrongful death of his intestate, he acts in the nature of a trustee for those among whom the recovery is to be distributed under our statute, and the declarations of the deceased are not competent as admissions against interest, as he being dead can have no interest therein. *Ibid.*

8. *Courts—Supreme Court—Decisions.*—An opinion of the Supreme Court should be considered and applied as a precedence in its relation to the facts upon which its conclusions of law are based. *Dowling v. R. R.*, 488.

9. *Courts—Rules of Court—Enforcement—Appeal and Error.*—The rules of the Supreme Court regulating appeals are mandatory and for equal enforcement as necessary to the more prompt and careful con-

COURTS—*Continued.*

sideration and decision of the cases appealed from, and the due and orderly consideration of appeals may not be interfered with by the Superior Courts, the Legislature, or others. *Womble v. Gin Co.*, 577.

10. *Courts—Rules of Court—Statutes—Certiorari—Appeal and Error.*—The appellant from an order of the Superior Court finding him guilty as for contempt of court, and who moves for *certiorari* in the Supreme Court, shows no legal excuse for the failure of the judge to have settled the case under due and orderly procedure, when the judgment fully and in an orderly manner sets forth the necessary facts upon which it was based; the appellant has taken an unusual time in preparing and serving his case, and he has not complied with C. S., 643, with respect to the service of the case, and in other respects as required by the rules of court. *Ibid.*

11. *Courts—Discretion—Opening and Concluding Speech—Appeal and Error—Wills—Caveat.*—Upon the trial of an issue *devisavit vel non*, where the evidence is conflicting, the decisions of the trial judge as to whether the propounders or caveators to a will shall open and conclude, is one within his discretion, and is not reviewable on appeal. *In re Will of Brown*, 583.

COVENANTS. See Deeds and Conveyances, 1; Insurance, 1.

CRIMINAL INTENT. See Banks and Banking, 8.

CRIMINAL LAW. See Bills and Notes, 7; Constitutional Law, 10; Evidence, 15, 20; Homicide, 2, 5; Indictment, 2; Intoxicating Liquor, 1; Judgments, 9; Sheriffs, 1.

1. *Criminal Law—Assault—Husband and Wife—Self-Defense—Excessive Force—Questions for Jury.*—Where a wife is assaulted in the presence of her husband by one using insulting language relating to her innocence and virtue, and the assailant had put his arm about her, the husband has the same right as the wife in using sufficient force to repel the attack, and the question of whether the force he used in striking the assailant in the face was excessive for that purpose, or prompted by a spirit of revenge, etc., is one for the jury. *S. Maney*, 34.

2. *Criminal Law—Entry on Lands—Statutes.*—In order to convict of a misdemeanor under the provisions of C. S., 4300, for the "entry into any lands and tenements," etc., it is not necessary that the act of going on the lands be unlawful if the accused thereafter has in overpowering numbers cursed and abused the one in lawful possession, using threatening and abusive language, and where there is sufficient evidence of these facts, defendant's motion as of nonsuit is properly overruled. C. S., 4643. *S. v. Fleming*, 42.

3. *Same—Evidence—Nonsuit.*—On a motion for nonsuit in a criminal action, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. C. S., 4643. *Ibid.*

4. *Criminal Law—Involuntary Manslaughter—Instructions—Appeal and Error.*—Where the evidence upon a trial for a homicide tends to show

CRIMINAL LAW—*Continued.*

that in a fight between the defendant and deceased, willingly entered into by the former, the prisoner intentionally shot the deceased with a gun and killed him, and *per contra* that the deceased had taken the gun away from the prisoner, and while in the deceased's possession it was accidentally discharged by the act of the deceased and killed him, a verdict of involuntary manslaughter will be upheld on appeal, upon the facts of this case, under an instruction to the jury that "involuntary manslaughter is where death results unintentionally from an unlawful act negligently done," and the instruction is otherwise correct. *S. v. Evans*, 121.

5. *Criminal Law—Negligence—Actions.*—Negligence, in order to be criminal must be of a higher degree than that required to be actionable or sounding in damages in a civil action. *Ibid.*

6. *Criminal Law—Evidence—Cross-Examination—Assault and Battery—Deadly Weapon—Intent to Kill—Statutes.*—Upon a trial for an assault with a deadly weapon with intent to kill resulting in an injury, C. S., 4214, it is competent for the solicitor on cross-examination of the defendant who has testified as a witness in his own behalf, to ask him if on certain occasions he has violated certain criminal laws, when confined solely to the purpose of impeaching the testimony he had given. C. S., 1799. *S. v. Colson*, 206.

7. *Same—Corroborative Evidence—Declarations.*—Upon the prosecution of an action for an assault with a deadly weapon, a pistol, wherein the defendant denies he was the man who had shot the prosecuting witness it is competent for this witness to testify that immediately after the shooting he had said to bystanders that the defendant was the man, when confined to the purpose of corroborating his testimony previously given to that effect. *Ibid.*

8. *Same—Evidence—Verdict—Conviction of Simple Assault.*—Under an indictment for an assault with a dealy weapon, a pistol, with intent to kill, C. S., 4214: *Held*, the evidence in this case was sufficient to sustain a verdict under C. S., 4640, of an assault with a deadly weapon, which tended to show that the defendant fired at the prosecuting officer, a police officer, as the latter was attempting to stop him from driving off in his automobile in endeavoring to escape arrest under a warrant held by another police officer, who was with him for the purpose of making the arrest, with other evidence that the defendant knew the policeman fired upon as an officer of the law at the time. *Ibid.*

9. *Criminal Law—Instructions—Presumption of Innocence—Special Requests for Instructions—Burden of Proof—Reasonable Doubt—Appeal and Error—Objections and Exceptions.*—Where upon the trial for a homicide the judge has fully and sufficiently charged the jury that the State must satisfy them of the guilt of the accused beyond a reasonable doubt, the mere failure of the trial judge to instruct them as to the legal presumption as to the defendant's innocence, will not be sufficient to grant a new trial on appeal in the absence of a special request to that effect, this presumption not being considered as evidence in the case, though the authorities in other jurisdictions are conflicting. *S. v. Boswell*, 260.

CRIMINAL LAW—*Continued.*

10. *Criminal Law—Conspiracy—Declarations—Evidence.*—The declarations of one conspirator in the furtherance of a common design of several to commit a homicide, while the design exists, is competent evidence against them all, though not made in their presence, and the fact of conspiracy may be proven by the acts of different persons when legally sufficient to establish it. *Ibid.*

11. *Criminal Law—Judgments—Suspended Judgments—Good Behavior—Sentence.*—Where a defendant is tried for the violation of a criminal statute and taxed with the costs and required to give bond in a certain amount for his appearance in court for a certain period of time to show good behavior, the court after the full limit of time had expired is without warrant of law to adjudge that the defendant had violated the criminal law and impose a sentence of imprisonment upon him and assign him to work on the county roads. *S. v. Gooding*, 271.

12. *Same—Facts Found—Constitutional Law.*—Where a defendant convicted of a criminal offense has had sentence suspended upon condition that he appear at certain times in court and show good behavior, it is required that a judgment rendered at a later time find the facts upon which a sentence has been imposed and specify the findings of a certain criminal offense the defendant is found to have committed, in order to show that the defendant had been informed of the offense before sentence. Const., Art. I, sec. 11. *Ibid.*

13. *Criminal Law—Verdict—Eleven Jurors — Consent — Judgment—Appeal and Error—Reversal—Constitutional Law.*—While it may appear upon the face of the record in a criminal action on appeal to the Supreme Court that the defendant had agreed that the verdict of eleven jurors, one being excused for sickness, should be received as valid, the defendant may nevertheless insist that the verdict is invalid, and it appearing that it was not rendered by a verdict of twelve men it will be declared invalid and a new trial ordered. *S. v. Rouse*, 318.

14. *Criminal Law—Embezzlement — Evidence — Nonsuit.*—Where there is evidence that an agent is charged with the duty of selling a load of tobacco upon a local market on behalf of the principal only, and accordingly receiving the price, he intentionally and wrongfully converted it to his own use, it is sufficient to constitute the crime of embezzlement, C. S., 4268, and sustain a verdict of guilty, on a motion as of nonsuit. C. S., 4643. *S. v. Eubanks*, 319.

15. *Criminal Law—Indictment—Bill of Particulars—Courts—Discretion—Evidence—Scienter—Quo Animo.*—The granting of a bill of particulars on an indictment for a criminal offense is to primarily inform the accused of the charges against him, and secondarily to inform the court, and while this not strictly a part of the indictment, its effect is to confine the State in its evidence to the particulars stated, and it is reversible error to the prejudice of the defendant's rights for the court to admit, over his objection, evidence as to other criminal offenses not included in the bill. C. S., 4613; Const. of N. C., Art. I, sec. 11. *S. v. Wadford*, 336.

16. *Criminal Law — Abandonment — Justification — Statutes—Adultery of Wife—Instructions.*—While ordinarily the husband may not with-

CRIMINAL LAW—*Continued.*

draw his support from his wife and children, and compel her to leave him without violating our criminal statute, C. S., 4447, it is one of the exceptions to the rule under which the husband may prove justification, when she has committed adultery with another man, and an instruction which deprives the husband of this defense is reversible error. *S. v. Johnson*, 378.

17. *Criminal Law—Larceny—Instructions—Felonious Intent—Appeal and Error—New Trials.*—Where the evidence is conflicting upon a trial for larceny, the burden of proof is on the State to show beyond a reasonable doubt the legal elements of the offense charged, and that it was done with a felonious intent, and an instruction which fails to so charge the law thereon is reversible error. *S. v. Eunice*, 409.

18. *Criminal Law—Homicide—Evidence—Nonsuit—Death—Knife Wound—Cause and Effect—Blood Poisoning.*—Evidence tending only to show, upon a trial for wife murder, that the prisoner unintentionally in his sleep, as a result of a bad dream, inflicted upon his wife a wound too slight to have caused her death, except that from its neglect of treatment it may have been possible for blood poisoning to have set in therefrom that caused her death, is insufficient in law to sustain a conviction of manslaughter, and defendant's motion as of nonsuit should have been sustained, under C. S., 4643, in the absence of evidence, expert or otherwise, that death in the particular case, resulted from the wound's being infected by the poison; and where physicians have made an autopsy by exhuming the body of the wife after her burial, and the condition of her body was such as to make it in their opinion impossible to say that the particular wound resulted in death, this testimony alone is insufficient to sustain a verdict of manslaughter. *S. v. Everett*, 442.

19. *Criminal Law—Husband and Wife—Evidence of Wife.*—While in a criminal action against her husband the wife may not testify against him, her remarks made to him shortly before the commission of the crime, in the presence of third parties, tending to show his guilt, and not replied to by him, may be testified to by a party hearing it and being present at the time. *S. v. Graham*, 459.

20. *Criminal Law—Appeal and Error—State's Appeal—Statutes.*—Where there is a verdict convicting a defendant of a misdemeanor under the provisions of a statute prohibiting the drawing of a worthless check on a bank under certain conditions, and a judgment has been rendered in favor of the defendant *non obstanti veridicto*, the State may appeal under the provisions of our statute. C. S., 4649. *S. v. Yarboro*, 498.

21. *Criminal Law—Burden of Proof—Reasonable Doubt.*—The reasonable doubt beyond which the State, in a criminal action, must show guilt of the offense charged, is not one which is vain or imaginary, but one based upon reason and arising from the evidence in the case. *S. v. Sigmon*, 190 N. C., 690, cited and approved. *S. v. Hege*, 526.

22. *Criminal Law—Evidence—Admissions.*—Where the defendant is indicted for violating the Turlington Act by having the unlawful possession of whiskey, testimony of the officers making the arrest that the defend-

CRIMINAL LAW—*Continued.*

ant said at the time thereof that he had been caught and there was no use to deny it, is competent as an admission of guilt by the defendant. *Ibid.*

23. *Criminal Law—Indictment—Spirituous Liquor—Intoxicating Liquor—Felonies—Misdemeanors—Verdict—Judgment.*—An indictment charging separately the unlawful manufacture of spirituous liquor, permitting the operation of a distillery on his land, the unlawful possession, and the unlawful manufacture after conviction for the same offense, charges only misdemeanors except as to the last count, and when there is no evidence as to the former conviction, a general verdict of guilty should be set aside as to this count, and a judgment imposing a maximum and minimum sentence is reversible error. C. S., 3409, 7738. *S. v. Barnhardt*, 622.

24. *Criminal Law—Verdict—Judgment—Sentence—Reversal.*—Where the verdict in an indictment charging the receiving of stolen goods knowing them to have been stolen, is "guilty of receiving stolen goods," it is defective as not being responsive to the charge or falling within the requirements of the statute to constitute the offense made in the indictment, and thereon a judgment may not be entered or a sentence imposed. *S. v. Shew*, 690.

25. *Same—Appeal and Error—Instructions—Venire de Novo—Courts.*—Where the verdict in a criminal action is not sufficient to support a judgment, it should not be received by the court, but returned to the jury with instructions so that it may be remedied, and where the judge has received the verdict, on defendant's appeal, a *venire de novo* will be ordered. *Ibid.*

26. *Criminal Law—Judgments—Defect—Procedure.*—Where the count in an indictment is insufficiently alleged, it may then be cured by the solicitor's sending a correct bill to the grand jury. *Ibid.*

CROSS-EXAMINATION. See Criminal Law, 6; Master and Servant, 14.

CROSSINGS. See Railroads, 3.

DAMAGES. See Actions, 3; Banks and Banking, 13; Carriers, 1, 2; Contracts, 6; Constitutional Law, 9; Corporations, 3; Deeds and Conveyances, 10; Fraud and Deceit, 1; Instructions, 9; Landlord and Tenant, 4, 5; Libel and Slander, 1; Master and Servant, 1, 2, 6, 8, 13; Navigable Waters, 1; Nuisance, 1, 2, 8, 9, 10; Railroads, 1, 2; Removal of Causes, 3; Sheriffs, 1; State Highway Commission, 1; Telegraphs, 1, 3, 6; Trials, 2; Verdict, 6; Waters and Watercourses, 1, 3.

1. *Damages—Mental Anguish—Evidence—Questions for Jury—Courts—Matters of Law.*—Where the plaintiff sues to recover damages for mental anguish she has sustained by not reaching the bedside of her dying mother, etc., alleged to have been caused by the mixed train upon which she was a passenger running greatly behind its schedule time, and there is no evidence that she had received any but courteous treatment from the defendant's conductor, to whom she stated the circumstances, or any other of the defendant's agents or employees: *Held*, error to submit to the jury the question of plaintiff's recovery

DAMAGES—*Continued.*

of punitive damages as none are recoverable as a matter of law upon the evidence in the case. *Tripp v. Tobacco Co.*, 193 N. C., 614, cited and applied. *Picklesimer v. R. R.*, 40.

2. *Damages—Arrest—Pleadings—Demurrer.*—No cause of action is alleged in the complaint upon allegations that defendant who was on his appearance bond to appear at court upon appeal from a misdemeanor, misinformed the plaintiff that the cost of the prosecution had been paid and he was discharged, and in consequence of this erroneous statement he had been taken on a *capias* and incarcerated, thereby sustaining the damages in suit. *Garris v. Young*, 340.

3. *Damages—Bills and Notes—Measure of Damages.*—Although formerly held in England that when plaintiff is a merchant or trader the jury may award substantial damages in proper instances, but when otherwise the jury may award nominal damages or such actual damages as are proven, the reason for the distinction is obsolete; and any person will be deemed substantially damaged upon the refusal of a bank to pay his check, unless protected by the provisions of 3 C. S., 220(m), and substantial damages may be awarded. The analogy to libel and slander pointed out. And where the nonpayment is through malice, punitive damages may also be recovered. *Woody v. Bank*, 549.

4. *Damages—Parent and Child—Infants—Negligence.*—An unemancipated infant can recover only such permanent damages for an injury as may result to him after his majority. *Hunt v. Power Co.*, 696.

DAMS. See Negligence, 18, 20.

DANGER. See Highways, 1.

DATE. See Wills, 3.

DEADLY WEAPON. See Criminal Law, 6.

DEATH. See Criminal Law, 18; Wills, 2.

DEBTOR AND CREDITOR. See Banks and Banking, 1; Equity, 2, 5; Insurance, 3; Limitation of Actions, 1; Partnership, 2.

DECEIT. See Principal and Agent, 1.

DECISIONS. See Actions, 4; Courts, 8.

DECLARATIONS. See Courts, 7; Criminal Law, 7, 10; Evidence, 15; Husband and Wife, 6; Wills, 9.

DEEDS AND CONVEYANCES. See Appeal and Error, 1, 2; Evidence, 3, 10; Executors and Administrators, 1; Fraud, 2, 3, 5; Husband and Wife, 1, 2; Infants, 1; Mortgages, 1, 5, 7; Partition, 5; Partnership, 3; Taxation, 2.

1. *Deeds and Conveyances—Restrictions as to Residences—Covenants—Changed Conditions — Equity — Injunction.*—The restrictions in the deed from the original owner of lands subdivided into lots that the lots thus conveyed should be used for residences and not for business or mercantile purposes, will not be enforced in equity by injunction against the prohibited use when it is made to appear that the conditions in the lapse of time have so changed that to enforce the restric-

DEEDS AND CONVEYANCES—*Continued.*

tions would be detrimental to all the present owners of the property; as where originally residential property was the class thereof desirable, and the object to be obtained, but that the city had since extended its limits, paved its streets, furnished modern conveniences, water, sewerage, electric lights, etc., and the property in the neighborhood of the *locus in quo* had become built up into business property, and as such was of much greater value, and those holding under the original deeds, except the plaintiff in the suit, desired that the restrictions in their deed, in this respect, be removed. *Starkey v. Gardner*, 74.

2. *Deeds and Conveyances—Taxation—Sheriff's Deed—Statutes—Descriptions.*—A description of land in a list of sale for taxes as "Beaverdam Township, name T. D. Bryson heirs, acres 400, amount $10.00," when the land consisted of an undivided one-half interest in 70 acres, in 200 acres, in 331 acres, and in 200 acres, under separate State grants, is not a sufficient description under C. S., 7911; C. S., 8019, and a sale thereunder will be void. *Bryson v. McCoy*, 91.

3. *Same—Constitutional Law.*—For a valid sale of land for taxes, the tax list and notice of sale must contain a sufficiently definite description of the land to allow the land to be identified, and to be notice to those persons whose interest is to be affected, and if the description is not so definite, a sale thereunder will be void as not complying with the statute, and as taking property without giving notice and as not affording those whose property is sold an opportunity to be heard. State Constitution, Art. I, sec. 17. *Ibid.*

4. *Same—Latent Ambiguity — Parol Evidence — Contracts.*—Where a description in the tax list and notice of sale for taxes is "400 acres, Beaverdam Township," etc., the ambiguity therein is not one appearing upon the face of the tax list and notice of sale, but latent, and parol evidence to identify the lands is inadmissible. *Ibid.*

5. *Same—Statutes—Interpretation—In Pari Materia.*—With regard to the sale of lands of the delinquent taxpayer for the payment of taxes due thereon, construing C. S., 8034, with secs. 7911 as to listing, and 8019, requiring that the land be sufficiently described, it is *Held*, that the rule of evidence excluding parol evidence to identify the land with the description in case of latent ambiguity is not changed in such instances. For the purchaser's remedy, see C. S., 8037. *Ibid.*

6. *Deeds and Conveyances—Courts—Interpretation—Intent of Parties as Expressed by Themselves.*—Where the parties themselves have interpreted their deed to lands and expressed it in the written instrument, such interpretation will be given consideration by the court in its interpretation, and will be allowed to avail when substantially consistent with the other parts of the deed being construed and not declared inoperative for an apparent immaterial variation therewith. *Mitchell v. Heckstall*, 269.

7. *Same—Evidence—Boundaries—Location—Estoppel.*—Where in a deed to a mill site and certain lands included therein the parties have themselves expressed their true intent and meaning as to the quantity of lands conveyed, parol evidence consistent with the description in the deed, the admissions of the parties and the intent expressed

DEEDS AND CONVEYANCES—*Continued.*

by them in the instrument, are erroneously rejected upon the trial, and it is reversible error for the trial court to disregard them and to hold that the grantor in the deed and those claiming under him were estopped by the deed, when the evidence excluded would tend to establish the fact otherwise. *Ibid.*

8. *Deeds and Conveyances—Trusts—Mortgages—Priority of Liens—Title—Registration.*—Where the grantee in a deed takes title in subordination to an existing unregistered mortgage on the lands, specifying the mortgagee with certainty, together with the fact that the title conveyed is subject thereto and the amount thereof in language that amounts to its ratification and adoption, and the deed is recorded, the grantee is deemed a trustee for the payment of the mortgage referred to and those claiming under his rights are bound by the trust created in the deed, and a later mortgage acquires only a secondary lien under a later but prior registered mortgage to that set out in the original conveyance. *Hardy v. Fryer*, 420.

9. *Deeds and Conveyances—Warranty — Encumbrances — Municipal Corporations — Street Improvements — Liens — Statutes — Mortgages — Actions.*—Assessments made upon the property of the owner for street and sidewalk improvements by a town, and in all respects under the authority conferred on the municipality by statute, extending in partial payments over a designated period of time, are to be regarded in the nature of a statutory mortgage when due and payable, and constitute liens on the property within the warranty clause against encumbrances contained in a deed, and recoverable in the grantee's action against the grantor to the extent he has been required to pay them. C. S., 2713, 2716, 2717. *Coble v. Dick*, 732.

10. *Deeds and Conveyances—Timber — Fraud — Misrepresentation—Damages—Independent Investigation.*—Where the purchaser of lands acts upon his own investigation as to the quantity of timber standing thereon, which is a paramount inducement to him to buy, and in consequence thereof he has bought at a less price than they were offered to him, and he has received a deed without warranty as to the quantity of timber, he may not recover from his vendor damages upon the latter's alleged fraudulent representation as to a greater quantity of timber than that actually conveyed, as the purchase was made independent of the alleged fraudulent representations and not in consequence thereof. *Patton v. Fibre Co.*, 765.

11. *Deeds and Conveyances—Conditions—Conditions Precedent—Issues.*—A grantor in a deed having a condition precedent, in an action to recover land for condition broken has the right to have the issue of rents and profits submitted to the jury, when there is evidence thereof. *Sparks v. Sparks*, 809.

12. *Deeds and Conveyances—Development of Lands—Maps—Lots—Reservation of Lot.*—Effect of owner reserving certain lot for the benefit of grantees in deeds containing restrictions in developing certain lands by sale into separate lots. *Justice v. Carland*, 819.

DE FACTO. See Courts, 4.

DEFAULT. See Certiorari, 1; Evidence, 2.

DEFAULT AND INQUIRY. See Clerks of Court, 1; Judgments, 5.

DEFECTS. See Criminal Law, 26; Indictment, 2; Judgments, 8.

DE JURE. See Courts, 4.

DEMURRER. See Actions, 6; Banks and Banking, 4; Damages, 2; Equity, 4; Fraud, 2; Judgments, 3; Pleadings, 3, 5, 8, 12.

DEPOSITS. See Banks and Banking, 1, 4; Counties, 1, 4.

DEPUTIES. See Sheriffs, 1.

DESCENT AND DISTRIBUTION. See Wills, 14.

DESCRIPTION. See Appeal and Error, 2; Deeds and Conveyances, 2; Mortgages, 2, 3.

DEVISE. See Wills, 1, 4.

DIRECTING VERDICT. See Evidence, 26.

DISABILITIES. See Infants, 1.

DISAFFIRMANCE OF CONTRACT. See Infants, 1.

DISCRETION. See Certiorari, 1, 2; Courts, 11; Criminal Law, 15; Highways, 2; Limitation of Actions, 2.

DISCRETION OF COURT. See Appeal and Error, 18; Evidence, 13; Judgments, 7; Jury, 7; Partitions, 2; Pleadings, 11; Verdict, 6.

DISCRIMINATION. See Constitutional Law, 7.

DISMISSAL. See Appeal and Error, 4, 6, 17, 18; Certiorari, 2.

DISSOLUTION. See Partnership, 2.

DIVERSE CITIZENSHIP. See Removal of Causes, 4, 7.

DIVORCE.

1. *Divorce — Statutes — Abandonment — Appeal and Error—Judgments—Presumptions—Alimony—Counsel Fees.*—Where in an action by the wife under C. S., 1667, and amendments thereto, she has duly moved the court for alimony *pendente lite* and an allowance for counsel fees, and the husband has answered and offered evidence to the effect that the plaintiff had abandoned him, and that he had not abandoned her and the record on appeal does not disclose any findings of fact upon the question, but only that the trial judge had refused the plaintiff's motion until the jury should determine the issue, the presumption is that the trial judge had held adversely to the plaintiff as to the fact. *Byerly v. Byerly*, 532.

DOCKETING. See Appeal and Error, 17, 18.

DOMICILE. See *Quo Warranto*, 3; Taxation, 5.

DRAFT. See Bills and Notes, 11; Evidence, 26.

DRAINAGE. See Water and Watercourses, 2.

DUTIES. See Banks and Banking, 12; Highways, 5; Landlord and Tenant, 4, 5; Verdict, 4.

DWELLING. See Intoxicating Liquor, 1.

DYING DECLARATIONS. See Evidence, 18.

EASEMENTS. See Railroads, 1.

EJECTMENT. See Landlord and Tenant, 1.

1. *Ejectment—Title—Defenses—Adverse Possession — Burden of Proof—Appeal and Error—New Trials.*—The burden of proving title by sufficient adverse possession is on the defendant in ejectment relying thereon, and where the evidence of the plaintiff has tended to show a perfect chain of paper title, the defendant's title is deemed to be in subordination thereto, C. S., 432, and it is reversible error for the trial judge in effect to instruct the jury that the burden of disproving the defendant's evidence is on the plaintiff. *Power Co. v. Taylor*, 231.

ELECTIONS. See Constitutional Law, 2; Highways, 14; Quo Warranto, 2; Schools, 2; Statutes, 2; Taxation, 10, 14, 15, 16, 17.

ELECTION OF REMEDIES. See Banks and Banking, 12; Insurance, 9, 10.

EMBEZZLEMENT. See Criminal Law, 14; Witnesses, 1.

EMINENT DOMAIN. See Railroads, 1.

1. *Eminent Domain—Municipal Corporations—Cities and Towns—Statutes—Prerequisites—Streets and Sidewalks.*—Under the provisions of our statute, C. S., 2792, before a city may take lands by condemnation to widen its streets, it is necessary for it to allege and prove that it had first attempted to acquire them by purchase or negotiations from the owners. *Winston-Salem v. Ashby*, 388.

2. *Same—Courts—Jurisdiction.*—Section 2792 of the Consolidated Statutes requiring an attempt by a city to acquire the lands of owners before proceeding to condemn the lands is jurisdictional. *Ibid.*

EMPLOYER AND EMPLOYEE. See Master and Servant.

ENTIRETY, ESTATES BY. See Estates, 3.

ENTRY. See Criminal Law, 2; Verdict, 2; Witnesses, 1.

EQUITABLE ASSIGNMENTS. See Mechanics' Liens, 1.

EQUITY. See Bills and Notes, 9; Costs, 1; Deeds and Conveyances, 1; Estoppel, 1; Evidence, 10; Insurance, 6, 7; Judgments, 6; Judicial Sales, 1; Railroads, 2; Trusts, 1; Vendor and Purchaser, 2.

1. *Equity — Judgments — Sales — Execution—Cloud on Title—Statutes—Actions—Suits.*—Under the provisions of C. S., 1743, the sheriff's sale of land by execution under a judgment may now be restrained by suit in equity when it will cast an additional cloud upon the title of the owner of the lands. *Mizzell v. Bazemore*, 324.

2. *Same—Estates—Debtor and Creditor—Void Limitations.*—Where a life estate is devised to the testator's son and changed by codicil to appoint a trustee to hold the title and to give him the full rights of

EQUITY—*Continued.*

enjoyment of a life tenant in the event a creditor should bring action against him for a debt: *Held,* the condition upon which the title is to be held in trust is void and his title as tenant for life will continue for the duration of his life, and a sale by execution under a judgment against him will not be enjoined as a further cloud upon his title. C. S., 677. *Ibid.*

3. *Equity—Suits—Actions—Parties—Mortgages — Priorities—Fraud—Mistake—Register of Deeds—Index.*—Equity will entertain a suit by the mortgagor to correct a mortgage which through fraud or mistake or the negligence of the register of deeds in cross-indexing has failed to give a priority of lien to one of several mortgagees entitled thereto, and the mortgagor is held to be a proper party plaintiff for the purposes of the suit. C. S., 446. *Gray v. Mewborn,* 348.

4. *Same—Pleadings—Demurrer.*—Where the mortgagor alleges sufficiently facts tending to prove that through fraud or mistake or error in the register of deeds failing to properly cross-index a mortgage, one of several of the mortgage lienors on the land has been wrongfully deprived of his priority of lien over another mortgagee, a demurrer to the complaint should not be sustained. *Ibid.*

5. *Equity—Set-Off—Banks and Banking — Mutuality of Debts — County Funds—Debtor and Creditor.*—While ordinarily the right of equitable set-off does not exist where there is a want of mutuality or the one claiming it has no right of action against the other in his own name, this principle is not applicable to county funds officially deposited in a bank since in a receiver's hands, and for which the depositor officially remains liable to the county, and he may offset his personal liability to the bank with the amount he may receive as a depositor of the county funds. *Coburn v. Carstarphen,* 368.

6. *Equity—Contribution — Bills and Notes—Indorsement.*—Where one of several indorsers on a note has been legally required to pay, and does pay the same, he is entitled to contribution from the other indorsers under the principle that equality is equity, among those standing in the same situation. *Harvey v. Oettinger,* 483.

7. *Equity—Judgments—Findings of Fact.*—In a bill of equity the facts of the controversy should be made to appear on appeal. *Bank v. Royster,* 799.

ERROR. See Appeal and Error.

ESCAPE. See Homicide, 3.

ESTATES. See Equity, 2; Insurance, 3; Wills, 1.

1. *Estates—Contingent Remainders—Happening of Event—Vested Estates —Sales—Reinvestment.*—Where the testator devises lands for life to a certain of his nephews by namè, with limitation over to the first female child who may be born to him if named for the testator, with certain further contingent limitations on the nonhappening of the first contingency, upon the birth of the female child and its being named for the testator according to the terms of the will, the remainder becomes certain as to the beneficiary designated, and becomes vested and is descendible to the heirs at law of such beneficiary:

ESTATES—*Continued.*

Held further, as to the right to have the lands so devised sold for reinvestment. See *McLean v. Caldwell*, 178 N. C., 424. *Bond v. Bond*, 448.

2. *Estates—Sales—Contingent Interests—Infants — Guardian ad Litem—Process — Service — Statutes — Judgments — Irregularities — Innocent Purchaser.*—Where in proceedings to sell lands affected with contingent interests the provisions of our statute, C. S., 1744, have been observed, the clerk of the Superior Court has appointed a guardian *ad litem* for contingent interests and for infant parties, the failure to serve summons on a minor is to be regarded as an irregularity that will not render the sale made by the commissioner appointed void and a nullity; and while it may on a proper showing be set aside as to all the parties, it is valid as to an innocent purchaser at the sale without notice of the irregularity; and on appeal to the Supreme Court, when this fact is not apparent, the case will be remanded for its ascertainment. C. S., 451, 483(2). *Welch v. Welch*, 633.

3. *Estates—Entirety—Husband and Wife—Personal Property—Wills—Interpretation—Intent.*—Under a bequest of personal property to husband and wife by entireties, the beneficiaries acquire the property as tenants in common, the law not applying to doctrine of survivorship except upon a devise of realty, and a clause in connection therewith "to have and to hold" the bequest to their survivors in fee simple, is but a statement of the incidents of an estate by entireties to husband and wife, the controlling intent of the testator, and does not vary its result. *Winchester v. Cutler*, 698.

ESTOPPEL. See Constitutional Law, 15; Deeds and Conveyances, 7; Insurance, 9, 10; Judgments, 6; Mortgages, 4; Partition, 5.

1. *Estoppel—Conduct—Equity—Evidence—Nonsuit—Husband and Wife.*—Where the title to farming lands was in the mother who lived thereon with her husband and son, the son having the management of the farm, and the latter two have induced a mercantile firm with which they had been dealing for a long period of time, to become an accommodation indorser on the son's note to a bank, with the father also an indorser thereon: *Held*, in order for the mercantile firm to estop the mother in equity from claiming title to the land and denying liability, it is necessary for the mercantile company to show such further acts or conduct on the part of the mother as would make it unconscionable for her to now assert her title, and there being no sufficient evidence thereof, under the facts of this case, her motion as of nonsuit in the bank's action upon the note should have been sustained. *Trust Co. v. Collins*, 363.

EVICTION. See Landlord and Tenant, 1.

EVIDENCE. See Agriculture, 1; Appeal and Error, 1, 9, 15, 16, 23, 25; Banks and Banking, 7; Bills and Notes, 1, 4; Carriers, 1; Contracts, 2, 4, 5, 6; Costs, 2; Courts, 7; Criminal Law, 3, 6, 7, 8, 10, 14, 15, 18, 19, 22; Damages, 1; Deeds and Conveyances, 7; Estoppel, 1; Fraud and Deceit, 1; Homicide, 1, 2, 3, 4; Husband and Wife, 1, 3, 4, 5, 6; Intoxicating Liquor, 2, 5; Judicial Sales, 1; Jury, 5; Landlord and Tenant, 1;

EVIDENCE—*Continued.*

Libel and Slander, 2, 5; Master and Servant, 3, 5, 9, 11, 12, 14, 15, 16; Municipal Corporations, 1; Negligence, 2, 4, 5, 7, 8, 10, 11, 13, 15, 16, 18, 21, 22, 26; Partnership, 3; Physicians and Surgeons, 2; Pleadings, 2, 4; Railroads, 3; Reference, 1; Waters and Watercourses, 3; Wills, 9.

1. *Evidence—Appeal and Error—Instructions—Harmless Error.*—A wife sought to have her husband declared her trustee in taking title to certain lands, and restrain his judgment creditor from selling the lands under execution in which judgment by default of an answer was rendered against the husband, but the judgment creditor answered and raised issues upon the question: *Held,* not prejudicial error to the answering defendant for the judge to allow in evidence the default judgment rendered against the husband, and to instruct the jury that the default judgment was excluded as to the rights of the judgment creditor to have the execution to issue. *Richert v. Supply Co.,* 11.

2. *Same—Judgments—Default—Pleadings.*—*Held,* under the facts of this case, that the default judgment entered by the clerk against her husband for the want of an answer could not bind the answering defendant or prejudice his rights. *Ibid.*

3. *Evidence—Pleadings—Variance—Deeds and Conveyances—Appeal and Error.*—Where a parol trust is sought to be engrafted on the title to lands conveyed to the husband in favor of the wife, is not a fatal variance between the allegation and the proof that there was a clerical error in the complaint in giving the date of the deed attached, and permitting this deed to be introduced in evidence where the description of the lands is identical in both deeds. *Ibid.*

4. *Evidence—Motions — Nonsuit—Circumstantial Evidence.*—Where various elements of a fact to be proven are so related and interwoven as to be sufficient when taken together to reasonably lead to a conclusion in the minds of the jury as to the existence of the fact and amounting to more than a scintilla, upon the defendant's motion as of nonsuit they are to be taken in the view most favorable to the plaintiff, with every reasonable intendment therefrom, and the motion will be denied. *Ledford v. Power Co.,* 98.

5. *Evidence—Master and Servant—Employer and Employee—Negligence—Safe Place to Work—Motions—Nonsuit.*—Where there is evidence tending to show that the plaintiff, a youth of seventeen years, inexperienced in such matters, was employed by the defendant company to render services in a tunnel it was making to connect the waters of two streams for furnishing additional power for its plant, and was ordered by the vice-principal of the defendant to enter the tunnel after an excavating explosion in the course of his employment, under threat of a discharge if he disobeyed, and that he was permanently injured from poisonous gas thus produced: *Held,* under the principle that it is the nondelegable duty of the master to furnish his employee a safe place to work an issue is raised for the determination of the jury, and defendant's motion as of nonsuit will be denied. *Ibid.*

6. *Same — Parties — Nonsuit as to Alter Ego — Actions — Nondelegable Duty.*—Where there is evidence tending to show that the master had negligently failed to furnish his servant a safe place to work, which proximately caused the injury in suit, and the vice-principal or *alter*

EVIDENCE—*Continued.*

ego of the master has been joined in the action, the dismissal of the action as to the *alter ego* does not affect the right of the plaintiff to recover of the master for its failure to perform its nondelegable duty. *Ibid.*

7. *Same—Safe Appliances—Questions for Jury.*—Where there is evidence tending to show that the plaintiff, in the course of his employment, was injured by poisonous gases resulting from explosions in excavating a tunnel for the defendant, that the ventilation was insufficient, and for like work the method known, approved, and in general use was to force, by a power-driven machine, air through the tunnel at a length of one thousand feet, which had the effect of avoiding the danger, evidence that the tunnel was not quite so long, and *per contra*, leaves the question of the defendant's actionable negligence to the jury, under the principle that the master owed a duty, under the rule of the prudent man, to furnish his servant a safe place to work. *Ibid.*

8. *Evidence—Nonsuit—Negligence — Contributory Negligence—Last Clear Chance — Signals — Warnings.*—Evidence tending to show that the plaintiff was employed by a road construction company to unload crushed rock from defendant railroad company's car at a siding, detached from the locomotive, to be used in the construction of a highway, and at the dinner hour was reclining with his back under an unloaded car, leaning against the sills of the track, with his legs projecting several feet from the side of the car, and without the customary signal or warning the defendant's locomotive suddenly, and without the knowledge of the plaintiff, attached itself to the train containing the car under which the plaintiff was reclining, surrounded by and talking and laughing with a number of others who had likewise stopped work for the noon hour, and that the attaching of the locomotive caused the car to run over and injure the plaintiff's hand and arm that were resting upon the rail: *Held*, upon defendant's motion as of nonsuit sufficient to take the case to the jury upon the issues of the defendant's actionable negligence, the plaintiff's contributory negligence, and the doctrine of the "last clear chance." *Watts v. R. R.*, 167 N. C., 345, cited and distinguished. *Buckner v. R. R.*, 104.

9. *Evidence—Act of God—Accident—Negligence—Nonsuit—Questions for Jury—Statutes.*—Where in a personal injury negligence case there is evidence for defendant that the injury in suit was caused either by the act of God, etc., or by an accident, and, *per contra*, that it was proximately caused by the defendant's negligence in the exercise of ordinary care to furnish the plaintiff, his employee, a reasonably safe place to work or reasonably safe appliances under the circumstances, defendant's motion as of nonsuit will be denied. C. S., 567. *Jones v. R. R.*, 227.

10. *Evidence—Questions for Jury—Contradictory Testimony of One Witness—Deeds and Conveyances—Equity—Reformation of Instruments —Fraud or Mistake.*—Where a timber deed is sought to be corrected for including erroneously other than cypress timber which alone was intended to have been conveyed, the testimony of one witness upon the question involved, though contradictory thereon, raises a question for the determination of the jury upon the issue of fraud or mistake. *Evans v. Cowan*, 273.

EVIDENCE—*Continued.*

11. *Evidence—Pleadings—Amendments—Admissions.*—In a civil action to recover for services rendered where an amendment to the complaint has been allowed and filed by the plaintiff, the allegations of the original complaint when contradictory to the plaintiff's position upon the trial are competent evidence of admissions when relevant and having that effect. *Morris v. Bogue Corporation*, 279.

12. *Same—Attorney and Client—Principal and Agent.*—Where the original complaint has been amended its allegations are competent as admissions of plaintiff, when falling within the rule, though the pleading has been signed only by the plaintiff's attorney and not signed or verified by him, it being within the scope of the authorized acts of the attorneys and a part of the court records in the case. *Ibid.*

13. *Evidence—Expert Opinion—Physicians and Surgeons—Witnesses—Appeal and Error—Discretion—Reversal.*—A general practitioner as a physician may qualify as an expert to give his opinion as such in a personal injury case for alleged malpractice, though he may not have specialized in that particular field in this case as an oculist; and where the trial judge has held him to be disqualified as a matter of law on this ground alone, his judgment does not fall within his discretion, and is reviewable on appeal. *Pridgen v. Gibson*, 289.

14. *Evidence—Nonsuit—Statutes.*—A motion by defendant as of nonsuit upon the evidence, C. S., 567, will be denied if the evidence, taken in the light most favorable to the plaintiff, and every reasonable intendment or inference to be drawn therefrom tends to maintain his right. *S. v. Carter*, 293.

15. *Evidence — Declarations — Contradiction — Instructions — Appeal and Error—New Trials—Criminal Law—Homicide.*—Declarations of a witness made to another as to the facts in a criminal action for homicide, are not admissible by the testimony of the one to whom they were made, unless the declarant's evidence or character has been in some way impeached on the stand, and then only to the extent they are not contradictory, and where contradictory as well as confirmatory evidence has been admitted by the trial judge upon exception of defendant, an instruction to the effect that the evidence should be considered only to the extent it corroborated the declarant's testimony, is reversible error. *S. v. Melvin*, 394.

16. *Evidence—Jury—Handwriting—Statutes.*—Where payment of a note sued on is pleaded and the genuineness of the signature of the payee to a receipt for the amount is in dispute, and an expert in handwriting has given his opinion upon comparing with a magnifying glass the disputed signature with the genuine one, it is not error for the trial judge to permit the jury, while deliberating upon their verdict, to make the comparison with the magnifying glass for themselves, when it does not appear that it could have been to the prejudice of the appellant. As to whether this is otherwise permitted under the provisions of C. S., 1784, *quere? Gooding v. Pope*, 403.

17. *Evidence—Nonsuit.*—On the defendant's motion as of nonsuit the evidence, and every reasonable inference therefrom, is to be accepted as true and construed in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment to be drawn therefrom. *Gore v. Wilmington*, 450.

EVIDENCE—*Continued.*

18. *Evidence — Dying Declarations — Statutes.*—Dying declarations to be competent must be based upon the establishment of certain preliminary facts, and otherwise they are inadmissible as hearsay. C. S., 160. *S. v. Franklin,* 192 N. C., 723. *Holmes v. Wharton,* 470.

19. *Evidence—Contributory Negligence—Nonsuit — Statutes.*—Contributory negligence may be taken advantage of on a motion as of nonsuit when the plaintiff's own evidence tends only to establish it. C. S., 567. *Elder v. R. R.,* 617.

20. *Evidence—Hearsay—Criminal Law — Burnings — Motive—Banks and Banking—Officers—Cashier.*—Where the cashier of a bank is indicted for the felonious burning of the building in which the bank conducted its business and kept its records, and to show motive the State relies upon evidence tending to show the defendant's defalcation and his purpose to conceal it by the destruction of the bank's ledger wherein the information should have been found by the State Bank Examiner, then examining the defendant's books: *Held,* testimony of the bank examiner to the effect that a statement of the bank handed to him by another official of his department supplied the information by which he ascertained the defalcation of the defendant, is incompetent as hearsay, its genuineness and accuracy not having been testified to by any competent witness, and its admission is reversible error in the absence of admissions or evidence rendering it competent. The exceptions to the rule of hearsay evidence stated by STACY, C. J. *S. v. Blakeney,* 651.

21. *Evidence—Nonsuit—Statutes.*—Where the trial court has erroneously overruled defendant's motion as of nonsuit at the close of the plaintiff's evidence, he waives his right thereto by introducing evidence, and upon his renewal of his motion the entire evidence will be considered. C. S., 561. *Harrison v. R. R.,* 656.

22. *Same—Defendant's Evidence.*—Upon a motion as of nonsuit under our statute, C. S., 567, the defendant's evidence will not be considered unless favorable to the plaintiff or not in conflict therewith, when it may be used to explain or make clear the evidence introduced by the plaintiff. *Ibid.*

23. *Evidence — Conflicting Evidence — Hypothetical Conclusions of Fact—Nonsuit.*—Where the evidence on the trial is insufficient in law to take the case to the jury, except that of one witness, which is contradictory, and in part favorable to each of the parties, the issue on which it is given is ordinarily for the jury to decide, but this result will not follow when his testimony in the plaintiff's behalf is based alone upon his fanciful hypothesis as to a possibly existing fact, of which he is not qualified to testify, and the conflict in his evidence arises merely from his argumentative deductions therefrom. *Ibid.*

24. *Evidence—Nonsuit.*—Upon defendant's motion as of nonsuit, the evidence which makes for the plaintiff's claim and tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its more favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. *Cromartie v. Stone,* 663.

EVIDENCE—*Continued.*

25. *Evidence—Boundaries—Common Reputation—Hearsay.*—Where it is agreed by the parties that the establishing of a beginning point should control the right of the plaintiff to mine upon the lands in dispute, the testimony of a surveyor to establish the true location of this point, based upon declarations of common reputation, is admissible as hearsay, unless in accordance with the requisites that they existed before the trial, had their origin at a time comparatively remote, were made *ante litem motam*, attached to some monument of boundary or natural object, or fortified by evidence of occupation and acquiescence tending to give the land some definite and fixed location. *Brown v. Buchanan*, 675.

26. *Evidence — Verdict — Directing Verdict — Bills and Notes — Drafts—Holder in Due Course—Prima Facie Case—Burden of Proof.*—Where an intervening bank of deposit claims the proceeds of a paid draft as holder in due course and not as an agency for collection for the drawer, the burden being on it to establish its rights, its request for a directed verdict upon the issue if the jury believe the evidence is properly denied, though it has made out a prima facie case by the endorsement, acceptance and possession of the draft. *Kaplan v. Grain Co.*, 712.

EXCEPTIONS. See Partition, 5.

EXECUTION. See Equity, 1; Judgments, 2.

EXECUTORS AND ADMINISTRATORS. See Courts, 5.

1. *Executors and Administrators—Sales—Deeds and Conveyances—Tender—Time Not the Essence—Change in Value of Lands.*—Where upon the petition of an administrator the court appoints a commissioner to sell the lands of the intestate, encumbered by mortgage, and convey title upon receiving part cash and the balance in certain deferred payments, it is required that the commissioner tender proper deeds to the purchaser, with satisfaction slip, or cancellation of the mortgage, and while time may not be regarded as of the essence of the contract, the purchaser will not be required to accept the deeds if by a prolonged delay the values of the lands purchased have changed. *Trust Co. v. Freeman*, 613.

EXEMPTIONS. See Taxation, 19.

EX MERO MOTU. See Pleadings, 9.

EXPERT TESTIMONY. See Evidence, 13; Witnesses, 1.

EXTENSION OF TIME. See Bills and Notes, 3; Pleadings, 11; Taxation, 7.

FAITH AND CREDIT. See Constitutional Law, 14; Process, 3.

FEDERAL CONSTITUTION. See Constitutional Law, 14.

FEDERAL COURTS. See Banks and Banking, 11; Insurance, 9, 10; Navigable Waters, 3; Removal of Causes, 1, 2, 4; Telegraphs, 1.

FEDERAL EMPLOYERS' LIABILITY ACT. See Actions, 4.

FEE SIMPLE. See Wills, 4.

FELLOW SERVANT. See Master and Servant, 7.

FELONY. See Criminal Law, 23; Judgments, 9, 11.

FERTILIZER. See Bills and Notes, 2.

FINDINGS. See Agriculture, 1; Appeal and Error, 29; Costs, 2; Criminal Law, 12; Highways, 4; Judicial Sales, 1; Physicians and Surgeons, 2; Reference, 1.

FIRES. See Negligence, 15.

FISHING. See Navigable Waters, 1.

FLIGHT. See Homicide, 3.

FORCE. See Criminal Law, 1.

FORCIBLE TRESPASS. See Criminal Law, 2.

FORECLOSURE. See Judgments, 6, 7; Mortgages, 3, 6; Taxation, 20.

FORFEITURE. See Insurance, 6, 7.

FRAUD. See Constitutional Law, 14; Contracts, 2; Corporations, 1; Deeds and Conveyances, 10; Equity, 3; Evidence, 10; Insurance, 4; Principal and Agent, 1; Statutes, 6; Trusts, 1.

1. *Fraud and Deceit—Damages—Evidence.*—In order to recover damages for fraud or deceit, it is necessary to show the representations, its falsity, scienter, deception and injury, in which representation must be definite, specific, materially false, knowingly made with fraudulent intent, or in culpable ignorance of the truth, reasonably relied on by the promisee, and caused the loss in suit. *Electric Co. v. Morrison*, 316.

2. *Fraud—Presumptions—Mortgages—Trusts—Deeds and Conveyances—Pleadings—Demurrer—Burden of Proof.*—Where a debtor conveys land to a trustee to secure a note given for the debt, the trustee holds the lands in trust for both of the parties to the conveyance, and where the debtor sells and conveys his equity in the *locus in quo* to his creditor in payment, there is no presumption of fraud in the transaction that would invalidate it at the suit of the creditor, and the burden of proof is on him to establish the fraud, and upon his failure to allege in his complaint facts beyond the existence of this relationship, the plaintiff's demurrer to the complaint, *ore tenus*, is good. *Simpson v. Fry*, 623.

3. *Fraud—Statute of Frauds—Parol Contracts—Third Parties—Contracts—Deeds and Conveyances.*—A verbal contract between plaintiff and defendant that the latter was to cut wood at an agreed price per cord, does not come within the Statute of Frauds, and is not affected by the fact that the defendant had not the legal title at the time of the cutting. *Maney v. Extract Co.*, 736.

4. *Fraud—Statute of Frauds—Contracts.*—The statute of frauds requiring contracts for the sale of lands to be in writing, applies to executory contracts, and not to those that have been executed. C. S., 988. *Keith v. Kennedy*, 781.

5. *Same—Executory Contracts—Executed Contracts—Deeds and Conveyances—Statutes.*—Where the contract between the plaintiff and de-

FRAUD—*Continued.*

fendant was for the sale of an automobile by the latter in consideration of which the defendant was to convey certain realty to the former, and receive two hundred and fifty dollars as the excess after paying the purchase price of the automobile, the title to the land subject to investigation by the plaintiff's attorney, and the defendant has accordingly executed a good and sufficient deed and the title is clear and unencumbered: *Held*, the contract is executed as to the conveyance of lands under the statute of frauds, C. S., 988, and the statute being inapplicable as to personalty, the defendant is entitled to recover upon his cross-action. *Ibid.*

FRAUDULENT JOINDER. See Removal of Causes, 4, 7.

FREEDOM OF THE PRESS. See Constitutional Law, 9.

GIFTS. See Husband and Wife, 1, 2; Wills, 14.

GOOD FAITH. See Banks and Banking, 8.

GOVERNMENT. See Constitutional Law, 5; Religious Societies, 1; Schools, 3.

1. *Government—Negligence—Cities and Towns—Water System.*—Where a city maintains a water system as a part of its municipal government for the use of its inhabitants, charging them water rates, it is not liable in damages caused by its negligence to one of them in the bursting of a water main and the flooding of a cellar in his store, wherein he kept merchandise, and under the facts in this case: *Held*, as to defendant's actionable negligence, the evidence was insufficient to be submitted to the jury. *Parks-Belk Co. v. Concord*, 134.

2. *Government—Actions—Negligence.*—An action for damages cannot be maintained against third party using government labor when negligence alleged is that occurring in government control. *Reeves v. Asheville Construction Co.*, 817.

GOVERNOR. See Courts, 2.

GUARDIAN. See Estates, 2.

HANDWRITING. See Evidence, 16.

HARMLESS ERROR. See Appeal and Error, 1, 2, 25, 27, 28; Evidence, 1; Homicide, 1; Intoxicating Liquors, 4; Verdict, 1.

HEADLIGHTS. See Negligence, 6, 8.

HEALTH. See Insurance, 4; Negligence, 20.

HEARSAY. See Evidence, 20, 25.

HEIRS. See Wills, 1.

HELP. See Master and Servant, 15, 16.

HIGHWAYS. See Counties, 3; Injunction, 1; Negligence, 6, 8, 25; Pleadings, 2; State Highway Commission, 1.

1. *Highways—Roads and Highways—Negligence—Rule of Prudent Man—Danger-Signals — Warnings — Barriers — Instructions — Appeal and Error—New Trials.*—A contractor for the construction of a State

HIGHWAYS—*Continued.*

highway is required to use the care of the ordinary prudent man to properly use such means as will protect those traveling thereon from being injured by places left in the incompleted work dangerous or menacing to those who may travel or attempt to travel along its route, and for its negligent failure therein is liable only for the proximate cause thereof; and an instruction that makes the defendant contractor liable absolutely to maintain an obstruction placed by it to prevent the use by the public of a place of danger, is reversible error upon which a new trial will be ordered on appeal. *Evans v. Construction Co.*, 31.

2. *Highways—Roads and Highways—State Highway Commission—Final Exercise of Discretionary Powers—Relocation—Statutes.*—The State Highway Commission is not authorized by statute to make an entire change of route in its system of State Highways between county-seats from one that it has finally adopted. *Carlyle v. Highway Commission*, 193 N. C., 49. *Newton v. Highway Commission*, 159.

3. *Same—Tentative or Temporary Location of a Link in the State's System of Highways.*—Where, by its acceptance and taking over of a county public highway, the State Highway Commission has made final its exercise of the discretionary power of locating a highway connecting two county-seats, thereafter the commission may not entirely change this route upon the theory that its location by them was only tentative or temporary, and that they had afterwards ascertained that the other route would be more advantageous from an engineering standpoint. *Ibid.*

4. *Same—Appeal and Error—Questions of Law—Findings of Fact.*—A finding of fact by the trial judge that an entire change of route in a link of highways connecting two county-seats was only temporary, is not binding upon the Supreme Court on appeal when, as a matter of law, upon the evidence, it is conclusively made otherwise to appear. *Ibid.*

5. *Highways—Roads and Highways—State Highway Commission—Duties of Commission.*—Under the statute providing for a State Highway System it is the duty of the State Highway Commission, in the exercise of the discretionary power given it, to select or locate the various roads in each county; to maintain and control the existing highways so selected and adopted "in the most approved manner as outlined in this act," and "relieve the counties and cities and towns of the State of this burden"; to do such work upon the various links of the system "as will lead to ultimate hard-surfaced construction as rapidly as money, labor and material will permit." *Ibid.*

6. *Same—Principal Towns—Statutes—Protest—Parties.*—Where the State Highway Commission has posted its maps at the county-seat of the county to be affected by its adoption of links in a State Highway, should any principal town along this route object thereto, it becomes the duty of such town, under the provisions of the statute, to object or protest the location, if they desire to do so, and upon their failure to exercise this statutory right, they are not proper or necessary parties to the proceedings, and it is not error for the trial court to refuse their motion to be made parties. *Ibid.*

HIGHWAYS—*Continued.*

7. *Same—Appeal and Error—Procedure—Presumptions.*—It is presumed on appeal, when the record is silent in relation thereto, that the State Highway Commission properly, and as the statute requires, made publication of the proposed adoption of a link in the State Highway System, by posting the map thereof at the county-seat, etc., as the law requires. *Ibid.*

8. *Highways—Roads and Highways—State Highway Commission—Principal Towns—Consent—Unimportant Changes of Route—Injunction.*—The provisions of the State Highway Act, ch. 46, Public Laws of 1927, required the consent of the street-governing body of the town for the State Highway Commission to change a highway connecting county-seats, by the express provisions of the act apply to county-seats and principal towns along the existing route, and not to such towns as do not come within the intent and meaning of the words "important towns," and where, in the exercise of its discretion, the State Highway Commission has not made a radical change, but a slight change to reduce the cost of construction of an existing route, the consent of an unimportant town is unnecessary, and having acted within the powers conferred, the act of the State Highway Commission therein, having previously posted the notices at the proper county-seat, etc., as the statute requires, and without valid objection, may not be enjoined. *Yadkin College v. Highway Commission*, 180.

9. *Highways—Roads and Highways—State Highway Commission—Appeal and Error—Agreement of Parties—Constitutional Law—Statutes.*—Where the Supreme Court has delivered an opinion upon the authority of the State Highway Commission as to change of route of a highway connecting two county-seats, a petition in the cause, although at the request of both plaintiff and defendant, cannot be entertained, the same not being authorized either by our Constitution or statutes in conformity therewith. Const. of N. C., Art. IV, secs. 8, 9; C. S., 1411. *Newton v. Highway Commission*, 303.

10. *Same.*—Where it is a matter of much general public interest, and the court below finds the fact that there is no substantial departure, an approval is permissible under the decisions. *Ibid.*

11. *Highways—Roads and Highways—State Highway Commission—Statutes—Location of Roads — County Commissioners — Final Adjudication—Injunction.*—Where the road governing body of a county has objected to the location of one of its highways leading to the county-seat of an adjoining county, and has entered into the question of the proper route with the State Highway Commission, and thereafter, with consent of the county road governing body a route has been selected without material variation from that given in the legislative map and fiat: *Held*, the power of the State Highway Commission to slightly or immaterially vary the location of the highway in question is not at an end until its final acceptance thereof, and the work thereon will not be enjoined thereafter, at the suit of the taxpayers of the county. Chapter 2, sec. 7, Public Laws of 1921. *Carlyle v. Highway Com.*, 193 N. C., 48; *Newton v. Highway Com.*, *ante*, 170, cited and approved. *Smith v. Highway Commission*, 333.

12. *Highways—Roads—County Commissioners — Correction of Minutes—State Highway Commission—Loans—Contracts.*—Where the county

HIGHWAYS—*Continued.*

commissioners have exercised their statutory authority to loan county funds to the State Highway Commission, anticipating the allotment of State funds for the building of highways within the county, and have lawfully contracted for that purpose, it may not, after the passage of a later act, taking away this power, materially change the contract, but the county commissioners *nunc pro tunc* may correct the entries on their minutes theretofore duly passed and entered of record so as to make the entry speak the truth as to what had been regularly done, and to this end parol evidence is admissible, the time of the correction so made relating back to the time the entry should have been correctly made. C. S., 1310. *Oliver v. Highway Commission*, 380.

13. *Same—Petition of Taxpayers.*—Where the citizens and taxpayers have petitioned the county commissioners to issue county bonds and loan the proceeds to the State Highway Commission for the purpose of anticipating the State's allocation of funds to the county, wherein certain roads are designated, the county commissioners may disregard the roads designated in the petition and apply a part of the proceeds thus received to the building of certain other of the county roads found to be more necessary as links in the State system of highways, there being therein no element of contractual relations. *Ibid.*

14. *Same—Necessaries—Vote of People—Elections—Constitutional Law.*—Where it is established that the building of certain highways in a county is necessary to connect up the State highway system, bonds therefor may be issued by the county without submitting the question to the vote of the people. *Ibid.*

15. *Same—Contracts—Amendments—Public Benefit.*—Where a county has issued bonds to obtain money to lend to the State Highway Commission to expedite the building of necessary highways as links in the State system, to be repaid out of the allocation of the State funds, under a contract to do so, and thereafter have modified the contract so as to build at once two other certain highways that are necessary to be so built, and the interest of the holders of the county bonds is not affected: *Held*, the building of the two additional roads before the others will not be enjoined at the suit of the citizens and taxpayers upon the ground that the county commissioners were without power to so amend the original contract, it being both to the advantage of the county and its taxpayers as well as to the State. *Ibid.*

HOMICIDE. See Criminal Law, 18; Evidence, 15; Instructions, 1; Sheriffs, 1.

1. *Homicide—Evidence—Instructions—Self-Defense—Appeal and Error—Harmless Error.*—Where the trial judge has correctly instructed the jury upon the prisoner's right to defend himself upon evidence in his own behalf and *per contra*, tending to show that though he willingly entered into the fight he had committed the act later when suddenly it was made necessary to protect his life or himself from great bodily harm, an isolated expression excepted to will be considered with the connected subject-matter in which it was placed in the charge, and the excerpt, though objectionable in itself, will not be held as reversible. *S. v. Evans*, 121.

HOMICIDE—*Continued.*

2. *Homicide—Murder—Evidence — Premeditation — Criminal Law.*—Upon the trial for the commission of the capital offense of murder, where there is evidence that the prisoner killed the deceased by shooting him with a pistol, testimony that he had told the witness ten days before the killing that "he was going to get even with" the deceased is competent upon the question of premeditation or deliberation that would make the offense murder in the first degree. *S. v. Graham*, 459.

3. *Homicide—Flight—Escape—Evidence.*—The flight and concealment of the prisoner after a homicide he has committed, is a circumstance to be considered by the jury as evidence of his guilt, when properly excluded by the judge as evidence of premeditation or deliberation required for a conviction of the capital felony of murder in the first degree. *Ibid.*

4. *Homicide—Murder—Capital Felony — Evidence — Verdict—Appeal and Error.*—*Held*, upon this trial for a capital felony, the evidence was sufficient to sustain a verdict of guilty of murder in the first degree. *Ibid.*

5. *Homicide—Instructions — Murder — Manslaughter—Self-Defense.*—The charge of the judge to the jury in this action for the commission of a homicide is approved on the principle of second-degree murder, manslaughter and self-defense in the same case as reported in 193 N. C., p. 12. *S. v. Waldroop*, 751.

HUSBAND AND WIFE. See Estates, 3.

1. *Husband and Wife—Deeds and Conveyances—Gifts — Presumptions — Evidence—Instructions.*—While there is a presumption of a gift where the husband uses his money for the purchase of lands and takes title in his wife, it may be rebutted by showing that the money belonged to the separate estate of the wife, or was derived from other sources, and when the evidence is conflicting it is reversible error for the trial judge to charge the jury that there was a presumption of a gift without fully charging the law arising thereon. *Bank v. Crowder*, 312.

2. *Husband and Wife—Deeds and Conveyances—Gifts — Presumptions — Instructions.*—Where the cashier of a bank misappropriated its funds and used it as a part payment for lands to which he takes title in his wife, and there is no evidence tending to show that the wife repaid her husband or that it was repaid to the bank, it raises a presumption of a gift by the husband to his wife, which equity will set aside at the suit of the bank, and an instruction that the law presumed the gift is, upon the evidence, not erroneous. *Bank v. Crowder*, 331.

3. *Husband and Wife—Seduction — Alienation of Wife's Affection — Evidence.*—In an action brought by the husband to recover damages for seduction and the alienation of his wife's affection, it is competent to show in connection with other probative evidence introduced at the trial, for the purpose either of corroboration or the means by which the wife's affections were alienated, the defendant's offer of money, efforts to have the wife leave the State, repeated expressions of his affection for her, and the effect the defendant's conduct had on the mind of the plaintiff. *Hyatt v. McCoy*, 760.

HUSBAND AND WIFE—*Continued.*

4. *Same—Personal Injuries.*—In an action brought by the husband for the seduction of his wife, and the alienation from him of her affections, it is competent to show that the husband was paralyzed from a personal injury received while in defendant's employment, which was made use of by the latter for the accomplishment of his purpose, and allegations to that effect in the complaint should not be stricken out on defendant's motion. *Ibid.*

5. *Same — Subsequent Relations of Husband and Wife — Intercourse.* — Where the evidence tended to show that the plaintiff, in an action to recover damages for the seduction of his wife and the alienation from him of her affections, had received a personal injury while in the service of the defendant, and that the defendant made use of this injury in the pursuit of his purpose, evidence that since the injury he had not had intercourse with his wife is properly excluded, on the issue as to whether the defendant had had immoral relations with her. *Ibid.*

6. *Husband and Wife—Seduction — Alienation of Wife's Affection — Evidence—Declarations.*—In an action by the husband to recover damages for the alienation of his wife's affections, etc., testimony by the plaintiff of conversations he had had with her, is competent on the question of corroborating his wife's evidence and to show in part his humiliation, bearing upon the issue as to his damages, but not as to the criminal conversation between the defendant and the plaintiff's wife. *Ibid.*

HYPOTHETICAL QUESTIONS. See Evidence, 23.

IMPEACHMENT. See Verdict, 5.

IMPLIED TRUSTS. See Trust, 1.

INADVERTENCE. See Instructions, 4.

INDEMNITY BONDS. See Mechanics' Liens, 2.

INDEPENDENT CONTRACTORS. See Contracts, 1; Negligence, 1, 9, 22; Principal and Agent, 2.

INDEX. See Equity, 3.

INDICTMENT. See Criminal Law, 15, 23; Judgments, 8.

1. *Indictment — Intoxicating Liquor — Spirituous Liquor — Sufficiency of Allegations.*—Where the indictment sufficiently charges the offense of the unlawful possession of whiskey under the inhibition of the Turlington Act, a charge negativing the exception making it lawful to have such possession for family purposes, etc., is unnecessary to a conviction. 3 C. S., 3411(b). Turlington Act, sec. 10. *S. v. Hege,* 526.

2. *Indictment—Defects — Schools — School Terms—Public Schools—Statutes—Criminal Law.*—An indictment under the provisions of C. S., 5758, charging a parent with unlawfully and wilfully failing to cause his children, between the ages of 8 and 14 years, to attend the public schools of the district of his and the children's residence, as required

INDICTMENT—*Continued.*

by the statute, is defective in not observing the distinction that the parent, having the custody of his children, may have them attend private schools for the required period, and no conviction may be had under the charge set out in the indictment. *S. v. Lewis*, 620.

INDORSEMENT. See Bills and Notes, 3, 9; Equity, 6.

INFANTS. See Damages, 4; Estates, 2.

1. *Infants—Contracts—Deeds and Conveyances—Disabilities — Disaffirmance of Contracts—Benefits Retained.*—After becoming of age, one will not be permitted to repudiate his contract made when a minor and retain its benefits, and when he has acquired title to lands under a deed and reconveys the lands to the seller by mortgage to secure the balance of the purchase price, both of which conveyances are duly registered, and thereafter places another mortgage thereon which is still outstanding, he is not in position to reconvey the land which he still holds to his purchaser or his heirs at law and disaffirm his deed made when a minor, and demand the repayment of that part of the purchase money he then had theretofore paid. *Wright v. Hepler*, 542.

INHERITANCE. See Taxation, 19.

INJUNCTION. See Deeds and Conveyances, 1; Highways, 8, 11; Taxation, 8.

1. *Injunction—Roads and Highways—State Highway Commission.*—An injunction will lie against the State Highway Commission from proceedings to make a change in a link of the State System of public highways unauthorized by the statute. *Newton v. Highway Commission*, 159.

IN PARI MATERIA. See Constitutional Law, 1; Deeds and Conveyances, 5; Statutes, 4, 5; Taxation, 2, 15.

IN REM. See Wills, 7.

INSOLVENCY. See Banks and Banking, 4; Judicial Sales, 1.

INSTRUCTIONS. See Appeal and Error, 3, 10, 23, 24, 27, 28; Banks and Banking, 7; Bills and Notes, 1, 8; Criminal Law, 4, 9, 16, 17, 25; Evidence, 1, 15; Highways, 1; Husband and Wife, 1, 2; Intoxicating Liquors, 5; Negligence, 5, 19, 20, 21, 22, 23, 24; Tenants in Common, 1.

1. *Instructions—Homicide—Appeal and Error—Prejudice—New Trials.*—Where upon a trial for a homicide there is evidence tending to show that the prisoner acted in self-defense in taking the life of the deceased, an erroneous instruction to find the defendant guilty of murder in the second degree if the jury should find beyond a reasonable doubt that the killing was deliberately done, is not cured by other correct parts of the charge arising under the evidence of the case. *S. v. McHaffey*, 28.

2. *Same—Aiders and Abettors.*—Where several defendants are tried for a homicide, an instruction not based on sufficient evidence that some of them would be guilty as aiders and abettors depending upon whether the one who committed the act did so under certain circumstances, is reversible error as to those charged with aiding and abetting. *Ibid.*

INSTRUCTIONS—*Continued.*

3. *Instructions—Inadvertence—Corrections—Appeal and Error—Harmless Error.*—Where the trial judge correctly instructs the jury upon the evidence in the case, it will not be held reversible error for an erroneous inadvertence of the judge which he afterwards corrects in his charge. *Jones v. R. R.*, 227.

4. *Instructions—Requests for Instruction—Appeal and Error—Objections and Exceptions — Master and Servant — Employer and Employee — Negligence.*—Where in the servant's action to recover damages for an alleged negligent injury inflicted upon him by the master, the judge properly charged upon the evidence the principles of law relating to the burden of proof and proximate cause, the defendant must aptly submit a proper request for more explicit instructions thereon in order to avail himself of this position on appeal. *Lilley v. Cooperage Co.*, 250.

5. *Instructions—Contentions—Expression of Opinion—Statutes — Appeal and Error.*—An instruction will not be held for error as an expression of opinion by the trial judge forbidden by statute, because in stating the contention of the State in a criminal action he says that the defendant, a witness in his own behalf, should not be believed, as he had been proven a man of bad character, when the instructions upon the law arising from the evidence have been correct and free from error in this respect. *S. v. Boswell*, 261.

6. *Instructions—Requests for Instructions—Statutes.* — Where the judge has sufficiently charged the jury as to the law arising under the evidence in the case in compliance with C. S., 564, such further matters of instruction as the appellant may desire should be offered by special request for instruction. *Gore v. Wilmington*, 450.

7. *Instructions—Statutes.*—An instruction meets the requirements of C. S., 564, to state the evidence in a plain and correct manner and declare and explain the law arising thereon, when it clearly applies the law to the evidence introduced upon the trial, gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts, and the complaining party should call to the attention of the court the minor and relevant matters of evidence when an opportunity is afforded them that may tend to influence a verdict in their favor and bring the question up on an appeal from an overruled exception duly entered. *S. v. Graham*, 459.

8. *Instructions — Interpretation — Construed as a Whole — Appeal and Error.*—An instruction appealed from should be construed contextually as to its related parts, and not disconnectedly, and error then made to appear. *S. v. Hege*, 526.

9. *Instructions—Statutes—Expression of Opinion—Negligence—Damages.*—In an action to recover damages for a permanent injury alleged to have been negligently inflicted, an expression in the charge as to the presumed time the plaintiff would live, and the consequent diminution of his earning capacity, falls within the inhibition of our statute, C. S., 564. *Cogdill v. Hardware Co.*, 745.

10. *Instructions—Requests for Instructions—Appeal and Error.* — Where greater particularity is desired by a party, he should request special

INSTRUCTIONS—*Continued.*

instructions, when the charge construed as a whole sufficiently informs the jury as to the law applicable, under the evidence in the case. *Keith v. Kennedy*, 784.

INSURANCE. See Mechanics' Liens, 2; Physicians and Surgeons, 2.

1. *Insurance, Fire—Mortgages—Trusts—Premiums—Loss Payable Clause—Conditions—Covenants—Contracts—Cancellation—Notice—Statutes.*—The provision in the loss payable clause of a fire insurance policy taken out by the mortgagor that the mortgagee (or trustee) will pay the premiums on demand should the mortgagor not do so, is *held* to be a condition upon which the mortgagee may receive the benefit of the protection afforded by the policy as a special contract made in his favor, and not as a covenant that he will pay the premiums on demand of the insurer, upon the mortgagor's default: and upon the mortgagee's refusal or neglect to pay the premiums in default upon the insurer's demand, the latter may, after ten days written notice, cancel the policy contract under the provisions of our statute. C. S., 6437. *Whitehead v. Knitting Mills*, 281.

2. *Insurance, Fire—Policies—Mortgages — Loss Payable Clause — Settlement of Loss by Mortgagor—Actions.*—Where a fire insurance policy is issued on the dwelling of a mortgagor with a loss payable clause to the mortgagee as their interests may appear: *Held*, in the event the dwelling is destroyed by fire, the interest of the mortgagee as to the amount of his recovery is the same as that of the mortgagor, and after the latter has accepted a given amount in full settlement after the fire and executed his release, the former may not claim against the insurer an amount greater than that agreed upon and accepted by the mortgagor in the absence of fraud, but this does not apply when the form of the mortgage clause is that of the "New York Standard Mortgage Clause." *Everhart v. Ins. Co.*, 494.

3. *Insurance, Life—Policies—Contracts—Change of Beneficiaries — Husband and Wife—Estates—Debtor and Creditor — Statutes.* — While formerly an insolvent insured could not change, according to a provision in his policy, the beneficiary of his policy of life insurance from his estate to his wife, without consideration, against the rights of his creditors, this is now changed by our statute, C. S., 6464, providing that a policy of life insurance made payable to the wife, or after its issuance assigned and transferred, or in any way made payable to her, shall inure to her separate benefit. *Pearsall v. Bloodworth*, 628.

4. *Insurance, Life—Principal and Agent—Policies—Application — Representations—"Good Health"—Fraud—Collusion.*—Where the application for a policy of life insurance has been signed in blank, and delivered to the agent of the insurer, with the information that the insured had not been well, and the agent agreed that an examination by a physician need not be made, and the policy has been issued, at the death of the insured the policy may not be avoided on the ground that the application had falsely stated that the insured was then in good health, when no fraud or collusion is shown against the insurer by the agent or the insured, the act of the agent in so doing being within the scope of his employment. *Short v. Ins. Co.*, 649.

INSURANCE—*Continued.*

5. *Insurance, Fire—Policies—Contract—Sole Ownership—Encumbrance—Principal and Agent—Waiver.*—Where a policy of fire insurance provides that, not subject to waiver, it will be void if the insured has not the sole or absolute title to the property, unless specifically appearing by agreement to the contrary in the policy contract, it may be waived by the local agent when fully informed that the title was held in entirety by the insured and her husband, and encumbered by a mortgage in a specified amount, and the policy is accordingly issued and the premiums paid. *Aldridge v. Ins. Co.*, 683.

6. *Same—Imputed Knowledge—Forfeiture—Equity.*—Equity will construe a contract to reasonably avoid a forfeiture, and where the agent of a fire insurance company delivers a policy of fire insurance to the insured, with knowledge, contrary to its terms as affecting its validity, that the insured did not have sole and unconditional ownership, etc., the knowledge of the agent is imputed to the insurer and is a waiver of the written terms of the policy contract, upon its unconditional delivery. *Ibid.*

7. *Same—Notice.*—Where the agent of a fire insurance company has been informed by the insured that the property was subject to a debt, and that the policy, as he may elect, might be made to herself or to her husband, or both, as it belonged to them: *Held*, sufficient to put the agent on his guard, and inequitable to void the policy because the property was owned by the wife and her husband in entirety, and that the debt was not sufficiently described, and a forfeiture of the policy for that reason will not be decreed; and further, it is immaterial whether the agent understood the nature of real property so held by entirety. *Ibid.*

8. *Insurance—Fire Insurance—Principal and Agent—Contracts—Damages.*—Where the general agent of a fire insurance company for a limited territory, through the negligence of an employee, fails to write into the policy a statement required to make it valid, the agents are liable in damages to the insured for loss by fire, in an action based solely on that ground, and not upon the invalid contract of insurance negligently issued by them. *Case v. Eubanks*, 775.

9. *Same—Court's Jurisdiction—Federal Courts—Election of Remedies—Estoppel.*—Where a nonresident defendant fire insurance company has upon petition removed a cause from the State to the Federal Court upon a policy of insurance that was void in that jurisdiction, but not in the jurisdiction of the courts of this State, and the Federal Court has adjudicated that the plaintiff could not recover under the contract for a loss by fire, the plaintiff may thereafter bring action in the State court against the agents and recover damages from them occasioned by their own neglect in not inserting a provision in the policy that would have rendered it valid, the subject-matter of the latter action being based upon negligence and not on the policy contract, and the application of the doctrine of the election of remedies has no force. *Ibid.*

10. *Same.*—The law upon which the principle of the election of remedies does not apply under the facts of this case, is not affected by the fact that in the action in the Federal Court the plaintiff recovered

INSURANCE—*Continued.*

damages under the fire insurance contract for the loss of his furniture, but was denied recovery because in the court of Federal jurisdiction the policy sued on was void as to real property. *Ibid.*

INSURANCE, FIRE. See Insurance.

INSURANCE, LIFE. See Insurance.

INTENT. See Estates, 3; Wills, 14.

INTEREST. See Counties, 2; Courts, 7; Judgments, 7; Taxation, 24; Wills, 8.

INTERLOCUTORY JUDGMENTS. See Partition, 6.

INTERVENERS. See Actions, 7, 8, 9.

INTOXICATING LIQUOR. See Criminal Law, 23; Indictment, 1.

1. *Intoxicating Liquor—Spirituous Liquor—Dwelling—Purchase—Transportation—Statutes—Criminal Law.*—While section 10 of the Turlington Act (ch. 1, Public Laws of 1923), does not make it a criminal offense for one to have intoxicating liquor in his own dwelling for his own personal use or that of his family and friends, it is a violation of the criminal law, by the express provisions of 3 C. S., 3411(b), for him to either purchase it elsewhere or carry it there. *S. v. Winston*, 243.

2. *Intoxicating Liquor—Spirituous Liquor—Statutes — Possession — Evidence—Nonsuit—Questions for Jury.*—On a trial under an indictment for violating the Turlington Act (ch. 1, secs. 2 and 10, Public Laws of 1923), charging the unlawful possession of intoxicating liquors, evidence in behalf of the State tending to show that the defendant in erecting a gasoline station some distance from the dwelling in which he lived, and at the time of the search he had concealed on the premises of the gasoline station two barrels, in each of which several gallons of whiskey were found: *Held*, sufficient to take the case to the jury on defendant's motion to dismiss upon the State's evidence: *Held further*, evidence of such possession before the enforcement of the act in question is no defense thereunder. *S. v. Hege*, 526.

3. *Same—Unlawful Sale.*—Where on a trial for unlawful possession of intoxicating liquor inhibited under the Turlington Act, there is evidence tending to show that on the premises of the defendant's gasoline station and store two barrels partly containing whiskey were found concealed, buried in the ground and encased in concrete of the same character and material as the filling station, etc., testimony of the officer that the barrels, from the indications, had thus been there since the building of the station and store, is competent as tending to show that the possession of the whiskey was for an unlawful purpose. *Ibid.*

4. *Same—Appeal and Error—Harmless Error.*—Testimony in this case that the defendant when arrested for violating the Turlington Act, told the officer arresting him that once he had been an officer of the law, is held under the facts of this case immaterial to the issue, and at most, its admission was error nonprejudicial to the defendant. *Ibid.*

INTOXICATING LIQUOR—*Continued.*

5. *Intoxicating Liquor—Spirituous Liquor — Unlawful Possession — Evidence—Instructions.*—Evidence in this case tended to show, and *per contra,* that defendant had in his possession three bottles of whiskey in his pocket, one hundred yards from his dwelling: *Held,* under an indictment for unlawfully possessing intoxicating liquor, an instruction to convict if the jury found beyond a reasonable doubt that the defendant had intoxicating liquor in his possession, outside of his dwelling, is *held* correct, without the additional words "for an illegal purpose." *S. v. Briscoe,* 582.

INVESTMENT. See Estates, 1.

INVOLUNTARY MANSLAUGHTER. See Criminal Law, 4.

"ISSUE." See Wills, 1.

ISSUES. See Appeal and Error, 3; Bills and Notes, 8; Courts, 2; Deeds and Conveyances, 11; Master and Servant, 9; Mortgages, 5; Reference, 3, 4; Trials, 1; Verdict, 1.

JUDGE. See Courts, 2; Judgments, 5; Wills, 13.

JUDGMENTS. See Appeal and Error, 2; Clerks of Court, 1; Constitutional Law, 14; Courts, 5; Criminal Law, 11, 13, 23, 24, 25, 26; Divorce, 1; Equity, 1, 7; Estates, 2; Evidence, 2; Jury, 2; Mortgages, 3; Partition, 7; Pleadings, 3; Process, 2, 3; Taxation, 24; Verdict, 6.

1. *Judgments—Verdict—New Trials—Contracts.*—Where the plaintiff sues to recover from the defendant one-half of the profits derived from the sale of real estate as agents for the owner, under an agreement to that effect as to certain lands, a judgment upon the verdict in his favor which includes commissions on defendant's sale of lands of others not included in the contract sued on, is reversible error and entitled the defendant to a new trial. *Roberts v. Burton,* 19.

2. *Judgments—Alternative Judgments—Suspended Judgments—Execution—Appeal and Error—Matters of Law—Reversal.*—Where the officials of a bank have knowingly permitted deposits to be made in the bank while insolvent, a judgment that they be confined in the State's prison for a certain time, capias to issue at a stated term if the judge holding the term should find as a fact that restitution to the receiver in a certain amount of money had not been made by the defendants, is neither an alternate nor a suspended judgment, but is suspended execution and is valid; and the action of the trial judge at the ensuing term in holding it invalid as a matter of law, is reversible error. *S. v. Schlichter,* 277.

3. *Judgments—Demurrer—Consent of Parties—Appeal and Error—Appeal Abandoned—Jurors—Constitutional Law.*—Where it appears of record that a demurrer has been entered by the defendant in a civil action and not appealed from, and the parties agree that the trial judge should find the facts and enter judgment, the judgment so entered is not erroneous by reason of the fact that a demurrer had once been interposed and abandoned. *Bank v. Edwards,* 308.

4. *Judgments—Liens—Mechanics' Liens—Appeal and Error—Statutes.*—Where a laborer on a building being constructed has failed in his

JUDGMENTS—*Continued.*

action to establish a lien on the building, and judgment is entered creating only a judgment lien from which he has not appealed, the lien of the judgment takes effect from the time of its rendition, and does not relate back to the time of the filing of the lien in the clerk's office under the provisions of our statute relating to mechanics' liens so as to give it priority out of the proceeds of the sale of the property to the liens of other judgments theretofore entered. *Francisco v. Country Club*, 320; *Wadsworth v. Country Club*, 320.

5. *Judgment—Clerks of Court—Pleadings—Default and Inquiry—Appeal and Error—Resident Judge—Jurisdiction—Statutes.*—The power of the resident judge to hear appeals from the Superior Court clerk of the county of his residence must rest alone by statute, and he is without statutory authority to entertain such appeals involving the question as to whether the plaintiff in an action to recover for services rendered the defendant is entitled to a judgment by default and inquiry for the want of an answer. 3 C. S., 593; Const. of N. C., Art. IV, sec. 11. *Ward v. Agrillo*, 321.

6. *Judgments—Estoppel—Res Judicata—Mortgages—Foreclosure — Liens —Equity.*—A mortgagor is not estopped by judgment in a foreclosure proceeding on his lands from setting up by independent suit the facts that through fraud or mistake, etc., another mortgagee of the same lands had been deprived of his priority of lien when in the proceedings to foreclose the matter was neither set up nor litigated. *Gray v. Mewborn*, 348.

7. *Judgments—Verdict—Motion to Set Aside Verdict—Consent — Discretion of Court—Interest—Appeal and Error.*—A defendant by consenting to plaintiff's motion to set aside the answer to an issue, may not insist thereon as a matter of legal right as against a codefendant who objects and has an interest therein. *Inman v. Refining Co.*, 566.

8. *Judgments—Arrest of Judgment—Indictment—Defects in Indictment.*—Where a fatal defect in the charge of an indictment for a criminal offense, appears upon its face, it may be taken advantage of by motion in arrest of judgment. *S. v. Lewis*, 620.

9. *Judgments—Motions to Set Aside—Criminal Law—Verdict—Felony.*—A motion to set aside a verdict in a criminal action including a felony, with other counts charging misdemeanors, should be granted where there is no evidence that the defendant committed a felony and sentence for the felony has been imposed, and on appeal the case will be remanded. *S. v. Barnhardt*, 622.

10. *Judgments—Consent—Contracts—Courts—Contempt.*—A judgment entered by the court upon the written consent of the parties, without express provision therein, only confers upon the courts the power to construe the contract as it is written, and excludes from it the power to adjudge a party thereto in contempt for the violation of its terms. *Lentz v. Lentz*, 673.

11. *Judgments—Capital Felony—Sentence—Statutes—Appeal and Error.*—The judgment in this case sentencing the defendant to death for the commission of a capital felony, though making no reference to the trial or the crime of which the defendant was convicted, is *held* sufficient. C. S., 4659. *S. v. Taylor*, 738.

JUDICIAL SALES.

1. *Judicial Sales—Sales—Mortgages — Contracts — Corporations — Insolvency—Equity—Evidence—Findings—Appeal and Error.*—Where in proceedings in dissolution of an insolvent corporation it appears that the property is subject to mortgage, and from the facts found by agreement upon legal evidence by the trial judge, it was for the best interest of all concerned that it be sold at the judicial sale subject to the mortgage with the consent of the mortgagee, which had been given: *Held*, under a sale so made a deed made to the purchaser in due pursuance of the law, will be legal and convey to him the title to the property of the insolvent corporation, in the absence of evidence that it would be inequitable to the complaining parties who are interested therein. *Harvey v. Knitting Co.*, 734.

JURISDICTION. See Actions, 2; Banks and Banking, 11; Clerks of Court, 1; Courts, 1, 5; Eminent Domain, 2; Insurance, 9, 10; Judgments, 5; Navigable Waters, 3; Process, 2, 5; Removal of Causes, 1, 2, 4; Telegraphs, 1; Waters and Watercourses, 1.

JURY. See Criminal Law, 13; Evidence, 16; Judgments, 3; Reference, 3, 4; Verdict, 5.

1. *Jury—Polling Jurors — Courts — Constitutional Law — Constitutional Right.*—Upon the coming in of the verdict in a civil action, either party to the action has the constitutional right to have the jury polled before accepting the verdict as a unanimous one. Const. of N. C., Art. I, sec. 19. *In re Will of Sugg*, 638.

2. *Same—Verdict Taken by Clerk—Agreement of Counsel—Judgments—Courts—Clerks of Court—Terms of Court.*—Where in a civil action upon consent of the parties the trial judge instructs the clerk to take the verdict in his absence, and later the clerk receives the verdict, apparently unanimous, and upon request of a party to poll, one of the jurors answers the issue, "Yes, but—," and upon again being questioned by the clerk answers "Yes" without qualifying it: *Held*, the subsequent setting aside of the verdict by the judge upon his finding from the affidavit of the juror, that his answer was in the negative, and he had otherwise answered to avoid a mistrial, as the other eleven jurors were of an opposite opinion, is not erroneous. As to the effect of an agreement of the parties that the judgment should thus be taken after the expiration of the term of court, *quere?* the matter not being presented by the exceptions on this appeal. *Ibid.*

3. *Same—Wills—Caveat—Parties.*—While generally there are no adversary parties in proceedings to caveat a will, there are certain exceptions applying to particular instances, among them being the right of the parties to have the jury polled before accepting the verdict. *Ibid.*

4. *Same—Waiver.*—Where a party to an action requests the polling of the jury before accepting the verdict, it is the duty of the judge to accede, and the waiver of a party of his right to have the judge receive the verdict, in not requiring his presence, does not include the waiver of his right to have the jury polled, and when the verdict is thus received by the clerk, the objecting party has the right to have the clerk poll the jury upon his request. *Ibid.*

JURY—*Continued.*

5. *Jury—Evidence—Appeal and Error—Reversal.*—Where the rights of the parties to the action are made to depend upon the true location of a boundary line of lands, it is reversible error for the trial judge, without consent of the appellant, to permit the jury to take into the jury room with them, to aid in their deliberations of the issue, certain relevant maps, etc., that had been introduced in evidence. *Nicholson v. Lumber Co.*, 156 N. C., 59, cited and approved; *Gooding v. Pope, ante*, 404, as to comparison of handwriting cited and distinguished. C. S., 1784, not applying. *Brown v. Buchanan*, 675.

6. *Jury—Relationship of Jurors—Prejudice—Appeal and Error.*—Where two of the jurors trying the case are related to a party litigant, and the trial judge has found that they were unaware of the relationship at the time, and the verdict was without prejudice, it will not be disturbed on appeal. *Radford v. Young*, 747.

7. *Jury—Verdict—Influence—Motion to Set Aside Verdict—Courts—Motions—Discretion of Court—Appeal and Error—Review.*—Communications made to the jury by the officer in charge of them during their deliberation of the verdict in a criminal action, that defendant's relatives had endeavored to obtain lodging in the same boarding house with them, will not be sufficient to set aside a verdict against him when the trial judge, in his investigation, finds upon the evidence on defendant's motion, that the defendant had not been prejudiced, and refuses to set aside the verdict as a matter in his discretion. *S. v. Adkins*, 749.

JUSTICES OF THE PEACE. See Courts, 1; Limitation of Actions, 2; Vendor and Purchaser, 1.

JUSTIFICATION. See Criminal Law, 16; Libel and Slander, 3.

KNOWLEDGE. See Banks and Banking, 6; Insurance, 6, 7.

LABORERS. See Mechanics' Liens, 1.

LACHES. See Certiorari, 2.

LANDLORD AND TENANT.

1. *Landlord and Tenant—Ejection—Partial Eviction—Reduction of Rent—Burden of Proof—Evidence.*—In order for the defendant, in summary action of ejectment, to retain possession for partial eviction of the leased premises by paying relatively a reduction in the rental price fixed by his contract, he must prove that such eviction was caused by the plaintiff, or one acting under his authority, or one paramount in title, and upon failure of evidence of this character, his claim therefor is properly denied as a matter of law. *Blomberg v. Evans*, 113.

2. *Landlord and Tenant—Contracts—Options—Advancements — Liens — Statutes.*—A contract expressed and purporting to be a lease of lands for agricultural purposes, does not change the relationship of landlord and tenant between the parties upon the ground that if the amount of stipulated rent should be paid at a certain time it should be regarded as a credit upon the purchase of the land at a stated price, it not appearing that the transaction of the contemplated pur-

LANDLORD AND TENANT—*Continued.*

chase had been made under option given; and the landlord or one to whom the contract has been validly assigned may enforce statutory lien, C. S., 2355, in priority to the lien of one furnishing advancements for the cultivation of the crop. C. S., 2480. *Supply Co. v. Davis*, 328.

3. *Landlord and Tenant—Master and Servant—Employer and Employee.*—A cotton mill furnishing houses to its employees for a rent deducted from salary establishes the relationship of landlord and tenant in respect to the houses so furnished, and not that of master and servant. *Tucker v. Yarn Mill Co.*, 756.

4. *Same—Duty to Repair—Damages.*—The liability of a cotton mill which furnishes houses to its employees for a rent is no greater than that of a landlord in respect to such houses, and in the absence of a contract to repair, it owes no duty to the tenant to repair, or to keep in repair, and it is not liable for personal injuries resulting from defective condition in the premises existing at the time tenant took possession, unless such defect was hidden, within the knowledge of the landlord, and could not have been discovered by the tenant on reasonable inspection, the doctrine of *caveat emptor* applying. *Ibid.*

5. *Same—Contract to Repair—Damages.*—In this case the landlord, a mill, is not liable to its tenant, an employee therein, for damages for personal injury caused by a defect in the house rented, due to lack of repair, even though in the rental contract the landlord contracted to repair, damages in this case being too remote and not within the contemplation of the parties. *Jordan v. Miller*, 179 N. C., 73, and *Duffy v. Hartsfield*, 180 N. C., 151, cited and approved. *Ibid.*

LANDS. See Executors and Administrators, 1; Principal and Agent, 1; Removal of Causes, 1; Railroads, 1; Taxation, 22, 23.

LARCENY. See Criminal Law, 17.

LAST CLEAR CHANCE. See Evidence, 8; Negligence, 3, 19.

LAWS. See Judgments, 2; Taxation, 15; Statutes.

LEGACIES. See Wills, 5.

LEGISLATIVE POWERS. See Constitutional Law, 6.

LIABILITY. See Banks and Banking, 4, 10.

LIBEL. See Constitutional Law, 8.

LIBEL AND SLANDER.

1. *Libel—Newspaper—Profession—Minister of the Gospel—Damages—Libelous per se.*—A publication by a newspaper of and concerning the plaintiff that he was an "immigrant ignoramus," and towards those who disagreed with him upon the subject of evolution was discourteous, and that he was suppressed on one occasion for his bearing and conduct by the chairman of a legislative committee which was considering legislation involving the question of evolution, etc., affects the calling or profession of the one concerning whom the publication had been made, and if untrue, is libelous and actionable *per se*, without evidence of special damages. *Pentuff v. Park*, 146.

LIBEL AND SLANDER—*Continued.*

2. *Same—Retraxit—Evidence—Questions for Jury—Nonsuit.* — Where a newspaper has refused to publish a retraxit for its publication of and concerning a minister of the Gospel, which, if untrue, would be libelous, and publishes its refusal, asserting the truth of its former publication, and contrasting the plaintiff with other well-known ministers of the Gospel in the territory of its circulation, the reassertion of the truth of the former publication and the matter contained in the latter, together with other pertinent circumstances, are proper to be considered by the jury as evidence that the plaintiff, in his action for libel, had been injured in his vocation as a minister of the Gospel, and sufficient to deny defendant's motion as of nonsuit thereon. *Ibid.*

3. *Same—Pleadings—Justification—Mitigating Circumstances.* — In order to show circumstances under which a libel was published, that the jury should consider as mitigating circumstances that would reduce the amount of damages in an action for libel against a newspaper, the defendant must plead the justification or the mitigating circumstances relied on. *Ibid.*

4. *Libel and Slander—Slander — Principal and Agent — Privileged Communications—Actions.*—Where the superintendent of his codefendant's plant has information that an employee thereat had taken therefrom certain articles belonging to the codefendant employer, and had them in his possession at his home contrary to the rules of his codefendant, it is the duty of the defendant superintendent to make investigation for his employer, and remarks made by him solely and necessarily in the course of his investigation and for its purpose, that the plaintiff had stolen these articles so found, are privileged, and when made without malice, are not actionable. *Hearn v. Ostrander*, 753.

5. *Same—Malice—Evidence — Questions for Jury — Appeal and Error — New Trials.*—Evidence tending to show that the defendant superintendent exhibited certain articles found in the home of an employee contrary to the rules of his codefendant, his principal, and after making the investigation upon which he uttered the alleged slanderous words concerning the plaintiff, is sufficient to carry the case to the jury upon the question of whether the words claimed to have been privileged were spoken with malice. *Ibid.*

LICENSE. See Negligence, 5; Physicians and Surgeons, 1; Taxation, 1.

LIENS. See Agriculture, 1; Banks and Banking, 1; Contracts, 4; Deeds and Conveyances, 9; Judgments, 4, 6; Landlord and Tenant, 2; Process, 5; Taxation, 1; Mechanics' Liens.

LIMITATION. See Equity, 2; Negligence, 2.

LIMITATION OF ACTIONS. See Actions, 2; Bills and Notes, 6.

1. *Limitation of Actions—Mutual Running Accounts—Debtor and Creditor.*—A mutual running account between the parties so as to bring it within the terms of our statute, barring an action by one of the parties against the other three years after the last transaction between them, C. S., 421, finds no application when there is only an extension of credit for merchandise sold by one of them to the other

LIMITATION OF ACTIONS—*Continued.*

on open account and payment thereon by the other, and the statute, as a matter of law under the facts, will begin to run from the date of each purchase as to the item itself, unless the bar has been repelled in some recognized legal manner. *Brock v. Franck*, 346.

2. *Limitation of Actions—Pleadings—Courts—Justices of the Peace—Appeal—Trial de Novo—Discretion.*—An appeal from a court of a justice of the peace is tried *de novo* in the Superior Court, C. S., 661, and when the account sued on is admitted in the former court, it is discretionary with the trial judge to permit the plea of the statute of limitations which is necessary to defendant's right to set it up. *Fochtman v. Greer*, 674.

LOANS. See Counties, 2; Highways, 12.

LOCATION. See Deeds and Conveyances, 7; Highways, 2, 3, 8, 11.

LOGS AND LOGGING. See Master and Servant, 1, 7; Navigable Waters, 1; Negligence, 10.

LOSS PAYABLE CLAUSE. See Insurance, 1, 2.

LUNATICS. See Process, 3.

MALICE. See Libel and Slander, 5.

MALPRACTICE. See Actions, 3.

MANDAMUS. See Appeal and Error, 29.

MANSLAUGHTER. See Homicide, 5.

MAPS. See Deeds and Conveyances, 12.

MARITIME LAW. See Navigable Waters, 3.

MARRIED WOMEN. See Seduction, 1.

MASTER AND SERVANT. See Evidence, 5; Instructions, 4; Landlord and Tenant, 3, 4, 5; Negligence, 1, 4, 9, 13, 14.

1. *Employer and Employee—Master and Servant—Negligence—Railroads—Logging Roads — Comparative Negligence — Damages.* — A logging road comes within the provisions of C. S., 3467, and where an employee thereof, in the scope of his duties, is injured by its negligence, the doctrine of comparative negligence applies, and contributory negligence by the employee will not bar a recovery in an action by his administrator to recover for his wrongful death. *Brooks v. Lumber Co.*, 141.

2. *Master and Servant—Employer and Employee—Negligence—Comparative Negligence—Verdict—Damages—Appeal and Error.*—Where the plaintiff's complaint demands damages in a certain amount in his action involving the issues of negligence and contributory negligence, and the application of the rule of comparative negligence under the provisions of C. S., 3467, the fact that the jury has rendered a verdict

MASTER AND SERVANT—*Continued.*

for damages to the full amount demanded in the complaint under a proper instruction does not alone show that the jury had failed to follow the rule of damages prescribed in such instances, and the verdict will not on that ground be disturbed on appeal. *Ibid.*

3. *Master and Servant—Employer and Employee—Negligence—Evidence—Nonsuit.*—Evidence tending only to show that the plaintiff was an employee of defendant corporation in charge of a store in defendant's chain thereof in a city, and that defendant's assistant superintendent at that place, as a matter of accommodation, invited the plaintiff employee and his wife to ride to their home with him in an automobile furnished him by the defendant corporation for the performance of his duties: *Held,* the defendant is not liable in damages for the negligent driving by its superintendent which caused the damages alleged to have been received by the plaintiff and his wife, the subject of the action. *Peters v. Tea Co.,* 172.

4. *Master and Servant—Employer and Employee—Safe Place to Work—Negligence.*—An employer is required to use ordinary care under the conditions existing to furnish his employee a reasonably safe place to do the work required of him in the course of his employment, and proper tools and appliances with which to do it. *Jones v. R. R.,* 227.

5. *Same—Railroads—Evidence—Nonsuit—Questions for Jury—Statutes.*—Where there is evidence that it is the custom of a railroad company to furnish ladders to painters employed to paint its station house, and that one of them so employed had not been furnished with a proper ladder with hooks or with a certain ladder called a "chicken-ladder," but with an ordinary ladder that extended beyond the steep roof of the building upon which he was at work bending down and painting below the eaves of the roof, and that the ladder so furnished fell over and struck the plaintiff, causing him to fall about twelve feet to the ground below, causing the injury in suit, and that the injury would not have occurred if a proper ladder or appliance under the circumstances had been furnished: *Held,* sufficient to take the case to the jury upon the issue of the defendant's actionable negligence. C. S., 3466. *Ibid.*

6. *Same — Contributory Negligence — Damages. — Held,* that where the failure of a railroad company to furnish an employee engaged in the scope of his employment in painting a station house, a proper ladder or appliance which caused the injury in suit, comes within the provisions of C. S., 3467, and the contributory negligence of the plaintiff is not a complete bar to his recovery, but only to be considered *pro tanto* by the jury in diminution of the damages recoverable for a personal injury thus received by him. *Ibid.*

7. *Master and Servant—Employer and Employee — Negligence — Fellow-Servant—Statutes—Tramroads—Skidder—Logs and Logging.*—Where a tram railroad is engaged in loading logs by means of a skidder or loader operated by steam, and there is evidence tending to show that the fellow-servant of the plaintiff engaged in the scope of his employment in loading the logs, negligently caused one of the logs to drop upon the plaintiff and injure him: *Held,* under our statute, the com-

MASTER AND SERVANT—*Continued.*

mon-law doctrine exempting the defendant tram does not apply, C. S., 3465, and the defendant is liable in damages for the negligent injury proximately caused. *Lilley v. Cooperage Co.*, 250.

8. *Same—Damages—Contributory Negligence—Diminution of Damages—Nonsuit—Questions for Jury.*—Contributory negligence of an employee of a tram railroad company injured while engaged in the course of his employment in loading logs upon the car by a steam-driven skidder, does not bar recovery, but is only to be considered by the jury in diminution of the plaintiff's damages when considering the issues. C. S., 3467. *Ibid.*

9. *Master and Servant—Employer and Employee—Evidence—Assumption of Risks—Issues.*—Evidence tending to show that the plaintiff, in the scope of his employment with the defendant railroad company, was engaged in repairing a part of a machine used for loading rails upon the defendant's cars, and he was in a position of safety except for the negligence of the defendant's other employees, acting under the supervision of the defendant's vice-principal or *alter ego*, which resulted in a part of the loader flying around and striking the plaintiff causing the injury in suit, and the work upon which the plaintiff was engaged was not obviously or intrinsically dangerous otherwise: *Held*, insufficient to raise an issue of assumption of risks. *Troxler v. R. R.*, 446.

10. *Same—Negligence—Nonsuit.*—*Held*, upon the facts of this appeal, defendant's motion as of nonsuit upon the evidence was properly denied. *Ibid.*

11. *Master and Servant—Employer and Employee—Negligence—Evidence—Nonsuit.*—Where there was evidence that the plaintiff was employed to load rock in a field for the construction of a highway, requiring the bursting of a rock with a sledge hammer when too large for loading, and that the injury in suit was caused by a particle of stone flying into his eye from the stroke of the hammer upon the rock, it is insufficient evidence of the employer's negligence that he failed to furnish the plaintiff with goggles to have protected his eye, nothing else appearing. *Richardson v. Surety Co.*, 469.

12. *Master and Servant—Employer and Employee—Negligence—Safe Place to Work—Safe Instrumentalities — Evidence—Questions for Jury.*—Where the evidence is conflicting as to whether a city, in the exercise of due care, had failed to provide its employee with a safe method of cutting in two a cast iron pipe, and such as were known, approved and in general use, but instead required him to use a heavy sledge-hammer with which to strike a chisel held by another employee for the purpose: *Held*, the city is liable for the damages directly and proximately caused to the plaintiff's eye by a fragment of the pipe flying off from the blows of the hammer, and the evidence being conflicting the question of defendant's liability is properly submitted to the jury. *Jefferson v. Raleigh*, 479.

13. *Same—Damages.*—Where the master has been negligent in providing for his servant a safe method to do the work required of him, within the scope of his employment, in the exercise of ordinary care, it is not

MASTER AND SERVANT—*Continued.*

necessary to hold the master liable, that the particular injury caused thereby would result, but that injury would be likely to follow as a cause of his negligent act. *Ibid.*

14. *Master and Servant—Employer and Employee—Evidence—Safe Instrumentalities—Safe Place to Work — Cross-Examination — Impeaching Evidence.*—In an action for damages against the master for his negligence in not providing a safe method for the servant to do his work, wherein the evidence is conflicting as to whether the master should have furnished, in the exercise of due care, other and safer methods known, approved and in general use, and defendant's witness has testified on direct examination that the instrumentality furnished was the proper one, it is competent, on cross-examination and in contradiction, to bring out from him evidence to the effect that after the injury the master had adopted the method contended by the plaintiff to be the safer one. *Ibid.*

15. *Master and Servant—Employer and Employee—Sufficient Help—Nondelegable Duty.*—The master is required, as a nondelegable duty, to furnish, in the exercise of reasonable care, his servant with sufficient help to perform the duties required of him. *Jarvis v. Mills Co.*, 687.

16. *Same—Evidence—Nonsuit.*—Where the master has given his servant, long experienced in the work, the right to call on other like employees readily accessible in sufficient numbers, to assist him in piling heavy loom beams in a cotton mill, and the evidence tends only to show that the servant selected the place and called upon his foreman to help in the work, who told him to call another, in compliance with which the servant called only one man to help him, and in piling the beams in the usual manner the servant was injured, alleged to have been caused by insufficient help, in his action against the master to recover damages for this injury: *Held*, the defendant's motion as of nonsuit should have been allowed, and the fact that theretofore the plaintiff had complained to his master of insufficient help does not vary the result. *Ibid.*

MATERIAL. See Mechanics' Liens, 1.

MATERIALMEN. See Pleadings, 2.

MEASURE OF DAMAGES. See Damages, 3; Telegraphs, 2.

MECHANICS' LIENS. See Judgments, 4.

1. *Mechanics' Liens—Municipal Corporations—Schools—Public Buildings —Contracts — Equitable Assignments — Principal and Surety—Material—Laborers.*—Where a contractor for the construction of a municipal building has abandoned his contract, and the surety on his bond has obligated to pay for the materials used in the building and the laborers thereon, and the contractor has been paid in full up to the time of his abandonment, and the contractor has borrowed money from a bank secured by an order on the funds due him by the municipality when nothing was due: *Held*, the surety assuming to complete the contract is entitled to the balance of the funds in the hands of the municipality, regarding the order as an equitable assignment of the contractor's rights, as against the claim of the bank therefor. *Ins. Co. v. Board of Education*, 430.

MECHANICS' LIENS—*Continued.*

2. *Same — Insurance — Indemnity Bonds — Premiums.* — Where the contractor for a municipal building has taken out policies of indemnity against loss for personal injuries to his employees and others not required by his contract with the municipality, applicable to all buildings he was then erecting, and has defaulted in the completion of his contract, and the surety on his bond with the municipality has taken it over for completion: *Held*, the surety on the contractor's bond with the municipality is entitled to the balance due on the building as against an unpaid premium due the indemnity company. *Ibid.*

MENTAL ANGUISH. See Damages, 1; Telegraphs, 2.

MENTAL CAPACITY. See Wills, 8, 10, 12.

MERGER. See Banks and Banking, 9.

MERITS. See Certiorari, 2.

MINISTERS. See Libel and Slander, 1.

MISDEMEANORS. See Criminal Law, 23.

MISJOINDER. See Actions, 10; Appeal and Error, 20.

MISREPRESENTATION. See Deeds and Conveyances, 10; Physicians and Surgeons, 2; Vendor and Purchaser, 1.

MISTAKE. See Equity, 3; Evidence, 10.

MITIGATION. See Libel and Slander, 3.

MODIFICATION. See Appeal and Error, 15, 16; Partition, 7.

MONEY. See Telegraphs, 4.

MONTH. See Taxation, 18.

MORTGAGES. See Actions, 10; Contracts, 4; Deeds and Conveyances, 8, 9; Equity, 3; Fraud, 2; Judgments, 6; Judicial Sales, 1; Insurance, 1, 2; Sales, 1.

1. *Mortgages—Deeds and Conveyances—Title—After-Acquired Title—Estoppel—Trusts.*—Where a conveyance of lands designated on its face as a second mortgage conveys title to secure the payment of notes held by C., and in the premises, and in the *habendum* names the C. as the grantee, and following the *habendum* is a clause making it the duty of B., trustee, to sell the lands upon default in the payment of the notes, etc., on demand of the holder, etc., and upon foreclosure sale make the deed to the purchaser, etc., and B., the trustee, afterwards acquires title by deed from C., and the instruments are duly registered under the provisions of our statutes: *Held*, the sale under the trust deed is a deed of bargain and sale, and upon its registration, has the effect of a feoffment conveying the title to the grantee, and the trustee having afterwards acquired the title, is estopped to deny it. *Crawley v. Stearns*, 15.

2. *Mortgages—Description of Property Pledged—Notes—Bonds—Enlargement of Terms.*—Where the intent of a mortgage of hotel property construed in its entirety is only to pledge the lands of the mortgagor

MORTGAGES—*Continued.*

corporation as security to the payment of the bond of the mortgagor, a recitation in the bond that it "is one of a series . . . all equally secured by a deed of trust or mortgage of all the assets of said company," cannot alone have the power of extending the terms of the mortgage to embrace the personal property of the mortgagor. *Kenney v. Hotel Co.*, 44.

3. *Mortgages — Descriptions — Vagueness — Judgments — Foreclosure.* — Where the defense to an action to foreclose a mortgage is that the mortgage is void for vagueness of description of the lands therein conveyed as security for the note therein specified, and reference is made to a suit pending in the court and county that will definitely locate the *locus in quo*, and the location of the lands by the terms of the mortgage is to be surveyed and set aside from a larger tract of definite description, and the said action has been finally decided and thereby the description of the mortgaged lands can be definitely ascertained, and this action is specifically referred to in the pleadings in the present action: *Held*, the mortgage is not invalid upon the grounds set up in defense, but enforceable, and a foreclosure sale according to its provisions is properly decreed. *Wallace v. Bland*, 398.

4. *Same—Res Judicata—Estoppel.*—Where the sufficiency of the description of lands conveyed by mortgage is made to depend upon a division thereof among tenants in common in adversary proceedings which have terminated by final judgment for a division of the lands, and the question of the sufficiency of the description has been affirmatively determined by one judge holding the term of court, excepted to and appealed from but the appeal not perfected, and the succeeding judge has also determined the sufficiency of the description: *Held*, the matter is not *res adjudicata*, or concluded by the former judgment. *Ibid.*

5. *Same—Deeds and Conveyances—Contracts—Parol Agreement—Pleadings—Issues—Betterments.*—Where the defendant mortgagors resist the foreclosure of a mortgage on their lands for invalidity on the grounds of vagueness of description of the lands so conveyed, and set up the further defense resting upon an agreement made by the parties involving claim for betterments, to which the statute of frauds is pleaded, nothing else appearing no new issuable matters are raised, and it appearing that the mortgage was not void, the plaintiff in foreclosure is entitled to his relief. *Ibid.*

6. *Mortgages—Bills and Notes—Actions — Foreclosure—Notes—Makers—Husband and Wife—Appeal and Error.*—In a suit to foreclose a mortgage executed by a man and his wife, the latter not having signed the notes, a personal judgment against her is erroneous. *Trust Co. v. Pumpelly*, 580.

7. *Mortgages—Trusts—Substituted Trustee—Statutes—Sales—Foreclosure—Deeds and Conveyances—Title.*—Where the terms as to foreclosure in a deed of trust on lands to secure borrowed money have been complied with as to the substitution of the trustee, the method therein expressed for this purpose is contractual and does not arise under the provisions of C. S., 2583, requiring certain proceedings to be taken in the courts; and a deed made by a substituted trustee in accordance with the agreement passes the title to the purchaser at the foreclosure sale. *Trust Co. v. Padgett*, 727.

MOTIONS. See Appeal and Error, 5, 18; Evidence, 4, 5; Judgments, 7; Jury, 7; Pleadings, 7.

MOTIVE. See Evidence, 20.

MUNICIPAL CORPORATIONS. See Constitutional Law, 7; Deeds and Conveyances, 9; Eminent Domain, 1; Mechanics' Liens, 1; Negligence, 1, 5; Removal of Causes, 1; Taxation, 16.

1. *Municipal Corporations—Cities and Towns—Evidence—Admissions—Res Gestæ.*—Admissions of members of a governing body of a town must be *pars res gestæ* in order to be properly received in evidence, and when they relate to matters that have occurred in the past they are inadmissible. *Dillsboro v. Dills*, 185.

2. *Cities and Towns—Streets—Paving—Assessments—Adjoining Lands—Statutes.*—Where a town, to widen its streets, agrees with a railroad company that it would condemn a strip of land and give it to the railroad company if it would remove its tracks thereto at its own expense, it may not, after this arrangement has been carried out, assess the lands of the railroad company for street paving, as the property being a part of the street, is not "adjoining" within the provisions of our statute. C. S., 2708(3), ch. 56; C. S., Art. 9, *Lenoir v. R. R.*, 710.

MUNICIPAL FINANCE ACT. See Taxation, 11, 14, 15; Schools, 2.

MURDER. See Homicide, 2, 4, 5.

MUTUALITY. See Equity, 5; Limitation of Actions, 1.

NAVIGABLE WATERS. See Negligence, 18.

1. *Navigable Waters—Logs and Logging—Fishing—Negligence—Damages.*—While the rights of navigation are ordinarily paramount in a navigable stream to those of fishing therein, they should be freely and fairly enjoyed together except in case of conflict; and where in floating logs down a stream the negligence of the defendant has unnecessarily caused damages to the plaintiff's fishing machine, the former is held liable therefor. *Hardison v. Handle Co.*, 351.

2. *Navigable Waters—Negligence—Rafting Waters—Common Law.*—The rights to the use of navigable water are not superior for boats towing lighters or barges thereon to those using it for rafting purposes, and where the negligence of the former in such use causes the death of an employee on the latter, the principle of law upon the question of due and ordinary care applies as in negligence cases, and upon conflicting evidence the issues are for the jury to determine. *Cromartie v. Stone*, 663.

3. *Same—Jurisdiction—Federal Courts—Maritime Law.*—An action involving the recovery of damages for the negligent killing of plaintiff's intestate while employed in rafting logs on a navigable river, by the tort of the defendant in towing rafts or barges thereon, may be brought by the administrator in the State courts, according to the principles existing at common law, which afford a complete remedy under the issues of negligence, contributory negligence, damages, etc., and the jurisdiction is not confined to the courts of Federal jurisdiction under the maritime law. Section 20 of the Seaman Act of 1915, ch. 153, not considered in deciding this appeal. *Ibid.*

NECESSARY EXPENSES. See Highways, 14; Taxation, 10, 14, 15, 16.

NEGLIGENCE. See Banks and Banking, 6; Carriers, 1; Courts, 6; Criminal Law, 5; Damages, 4; Evidence, 5, 8, 9; Government, 1, 2; Highways 1; Instructions, 4, 9; Master and Servant, 1, 2, 3, 4, 7, 10, 11, 12; Navigable Waters, 1, 2; Principal and Agent, 2; Railroads, 3; Telegraphs, 1, 6; Waters and Watercourses, 1.

1. *Negligence—Contracts—Independent Contractor—Safe Place to Work—Municipal Corporations—Cities and Towns.*—Where a city contracts for the erection of a market house, to be not exceeding a certain cost when completed and accepted, and to pay the contractor in a certain sum for his services, and does not reserve or have supervision of the workmen or the contractor in relation thereto, the latter to pay all the cost of erection: *Held*, the contractor, under the terms of the contract, is an independent one, and the city is not liable in damages to an employee of the contractor for a personal injury caused by the failure of the contractor to furnish a reasonably safe place to work under the rule of the prudent man. *Drake v. Asheville*, 6.

2. *Negligence — Master and Servant — Safe Place to Work — Evidence—Questions for Jury.*—Evidence that the plaintiff was injured in the course of his employment by the failure of his fellow-servant to exercise ordinary care in furnishing him sound plank with which he and another employee were required to build a scaffold to a building on which he was to do his work, is sufficient to take the case to the jury upon the question of the actionable negligence of the defendant to perform his nondelegable duty in this respect. *Ibid.*

3. *Negligence—Last Clear Chance—Burden of Proof.*—Where the doctrine of the last clear chance is relied on by the plaintiff in an action for damages against a railroad company for a personal injury alleged to have been proximately caused by its negligence, the burden of proving the issue is upon him. *Buckner v. R. R.*, 104.

4. *Negligence—Evidence—Nonsuit—Master and Servant—Employer and Employee—Safe Place to Work.*—Evidence tending to show that plaintiff was defendant's workman in the construction of a building when snow was on the ground, and while engaged in the scope of his employment was injured by his foot slipping upon the ice and snow tracked into the building by the workmen therein, causing plaintiff to drop a heavy plank he was lifting upon his foot and injuring it: *Held*, insufficient to take the case to the jury upon the defendant's actionable negligence, and defendant's motion as of nonsuit thereon should have been sustained. *Owenby v. Power Co.*, 129.

5. *Negligence—Municipal Corporations—Ordinances—License—Permit to Drive—Evidence — Instructions — Proximate Cause.*—One driving an automobile in a city in violation of its ordinance requiring a driver's license is not liable in damages to one riding with him for his negligence in not avoiding a collision, unless the failure to have the license is the proximate cause of the resultant injury, and where there is no evidence thereof, an instruction of the court involving this phase of liability is error. *Peters v. Lea Co.*, 172.

6. *Negligence—Automobiles — Headlights — Highways — Rule of Prudent Man.*—The motorist upon a public highway on a dark, misty and foggy night, is required to regulate the speed of his car with a view

NEGLIGENCE—*Continued.*

to his own safety according to the distance the light from his headlights is thrown in front of him upon the highway, and to observe the rule of the ordinary prudent man. *Weston v. R. R.*, 210.

7. *Same—Speed Limits—Statutes—Evidence—Nonsuit.*—The failure of a motorist to stop his automobile before crossing a railroad at a grade crossing on a public highway, as directed by 3 C. S., 2621(b) "at a distance not exceeding fifty feet from the nearest rail," does not constitute contributory negligence *per se* in his action against the railroad company to recover damages to his car caused by a collision with a train standing upon the track, and where the evidence tends only to show that the proximate cause of the plaintiff's injury was his own negligence in exceeding the speed he should have used under the circumstances, a judgment as of nonsuit thereon should be entered on defendant's motion therefor properly entered. *Ibid.*

8. *Negligence—Automobiles—Evidence — Nonsuit—Highways—Headlights.* —Where the evidence tends only to show that the plaintiff was exceeding the speed required for his own safety under the rule of the prudent man in running his automobile on a dark and foggy night over a grade crossing with a railroad track, without stopping, and his car was injured by coming in contact with defendant's train standing thereon awaiting dispatch orders to move forward: *Held*, insufficient to take the case to the jury in plaintiff's action against the railroad company for damages thereby sustained in a collision with the defendant's train, and a motion for judgment as of nonsuit thereon should be granted upon the issue of plaintiff's contributory negligence. *Ibid.*

9. *Negligence—Master and Servant—Employer and Employee—Independent Contractor—Contracts—Burden of Proof.*—In an action to recover damages for an injury alleged to have been negligently inflicted, the burden of proof is on the defendant to show that the act complained of was caused by the negligence, if any, of an independent contractor, when the defense is relied upon. *Lilley v. Cooperage Co.*, 125.

10. *Same—Railroads—Tramroads—Logs and Logging—Skidder—Evidence Nonsuit—Questions for Jury—Statutes.*—Where the defense of an independent contractor is relied upon in an action to recover damages for an alleged negligent injury inflicted on the plaintiff, evidence in plaintiff's behalf tending to show that the relationship of independent contractor had before the happening of the accident been severed and that the defendant's employees were in charge of and loading logs upon the defendant's tramroad when the plaintiff's injury occurred in the course of his employment, is sufficient to take the case to the jury, under the facts of this case, as to his employment by the defendant at the time, upon defendant's motion as of nonsuit. C. S., 567. *Ibid.*

11. *Negligence—Railroads — Bridges — Guard Rails—Evidence—Nonsuit—Questions for Jury.*—Evidence tending to show that a railroad company maintained a bridge generally used by the public on a street of a town twenty-three feet above its track, with a banister supported by posts eight feet apart with a ten-inch plank at the top and bottom running with the lengthway of the bridge, leaving an open space

NEGLIGENCE—*Continued.*

between the planks twenty-three inches wide, is sufficient to sustain a verdict against the railroad company, and to deny its motion as of nonsuit, for its negligence in providing a bridge with insufficient guards to protect those using it, with other evidence tending to show that the intestate, a lad of 9 years of age, was playing on the bridge with other children, stumped his toe on a nail on the bridge about two feet from the rail, and thus was precipitated through the opening between the planks upon the track below and received an injury which caused his death. *Hoggard v. R. R.*, 256.

12. *Same—Contributory Negligence—Children.—Held,* under the evidence in this case it was a question for the jury to determine whether the plaintiff's intestate, a nine-year-old lad, was guilty of such contributory negligence as would bar his recovery, notwithstanding the negligence of the defendant railroad in not providing a bridge twenty-three feet above its track with sufficient banisters to prevent his falling through to the track below, thus sustaining injuries that caused his death. *Ibid.*

13. *Negligence—Master and Servant—Employer and Employee—Evidence—Speculation—Verdict—Reversal—Railroads—Tramroads.*—Where evidence tends only to show that the plaintiff's intestate was employed as a fireman on the defendant lumber company's tramway steam locomotive hauling cross-ties on flat cars attached, loaded in the customary manner, and was seen immediately before the injury on the ground in front of the slowly backing train too late to stop the train that killed him, and there is no evidence of defects in equipment or in the conduct of the defendant's other employees operating the train that would tend to show any negligence on the defendant's part: *Held,* the evidence as to defendant's negligence is too uncertain, vague, speculative and remote to sustain a verdict of damages in the plaintiff's favor. *Taylor v. Lumber Co.*, 354.

14. *Same—Violation of Employer's Rule for Safety.*—Where the evidence only tends to show that the defendant company's engineer on its tram locomotive came to his death by reason alone of his violating a rule of the company adhered to by the defendant not to jump from a running train, it is insufficient to take the case to the jury, there being no further evidence of the defendant's negligence in causing the death. *Ibid.*

15. *Negligence—Fires — Evidence — Conjecture—Nonsuit.*—In order to recover damages to plaintiff's land against the defendant for the negligent setting out fire by the employees in taking up its tramway operated by steam locomotives, there must be evidence that will raise more than a conjecture that the fire that caused the damage was in some way attributable to the defendant, and it is *Held,* insufficient to be submitted to the jury upon the issue of negligence that the fire could have been started by an ignited stump, somewhere near or on the defendant's right of way, when it does not tend to show facts and circumstances that the defendant or its employees were reasonably responsible for the originating cause. *Wilson v. Lumber Co.*, 374.

16. *Negligence—Contributory Negligence — Evidence — Street Railways—Automobiles—Proximate Cause—Concurring Causes.*—Where the evidence in a personal injury damage case, including that of plaintiff,

NEGLIGENCE—*Continued.*

tends only to show that while driving his automobile upon a street of a city at night, the plaintiff endeavored to pass another automobile from behind, was blinded by the lights from still another automobile and drove upon the track of defendant's street railway, and as evidenced by the rate of speed within the law each was going, was almost immediately struck by defendant's street car moving in an opposite direction, the plaintiff under the circumstances not being aware of its approach; assuming that the defendant was negligent in not giving warnings of the approach of the street car, or of having provided it with a fender: *Held*, upon the uncontradicted facts, the plaintiff's contributory negligence barred her recovery, upon the principle that her negligence coöperated with the negligent act of the defendant, and became the real, efficient and proximate cause of the injury complained of, or that without which the injury would not have occurred. *Elder v. R. R.*, 617.

17. *Negligence — Contributory Negligence — Proximate Cause—Nonsuit.*— Where the negligence of plaintiff's intestate in an action by the administrator to recover damages for his wrongful death, has concurred with that of the defendant in producing the injury that caused it, and was the real, efficient and proximate cause thereof, or the cause without which the injury would not have occurred, it bars his recovery. *Harrison v. R. R.*, 656.

18. *Negligence — Navigable Waters — Waters—Locks—Dams—Evidence—Nonsuit—Questions for Jury.*—Where there is evidence tending to show that the defendant had anchored for the night its boat towing two lighters, at a government lock or dam on a navigable river, in such a manner as to cause the second lighter, left without a light, to block up the provided entrance to the safe water of the river, and that in the night it caused the raft on which was riding the plaintiff's intestate, in not being able to pass into the safe water, to swing into the fast-flowing water of the middle stream which would carry the raft over the dam, which the defendant from long experience should have known, and that the intestate was in consequence forced to leave the raft, and was carried over the dam and was drowned: *Held*, there was sufficient evidence to take the case to the jury upon the issue of defendant's actionable negligence. *Cromartie v. Stone*, 663.

19. *Negligence—Contributory Negligence—Last Clear Chance—Railroads—Wrongful Death—Fact of Killing—Instructions.*—In an action against a railroad company for the negligent killing in the night of the plaintiff's intestate by the defendant's train running over him while lying apparently helpless upon the track, involving the issues of negligence, contributory negligence and the last clear chance, in which both in the pleadings and by the evidence it is controverted as to whether the intestate was dead at the time the train struck him, the fact as to whether he was killed by the train should first be determined by the jury, and a charge that fails to instruct the jury as to the law arising from the evidence in the case is reversible error to the defendant's prejudice. *Hunsinger v. R. R.*, 679.

20. *Negligence—Proximate Cause—Ponding Waters—Health—Instructions—Appeal and Error.*—In an action to recover damages for the conse-

NEGLIGENCE—*Continued.*

quent sickness or ill health of the plaintiff resulting from the alleged negligence of the defendant power company in damming a stream and constructing its plant, the question of proximate cause is a vital element in order for him to recover, and an omission so to charge upon the evidence in the case is reversible error. *Hurt v. Power Co.*, 696.

21. *Negligence—Evidence—Proximate Cause—Instructions.*—In an action brought by the personal representative for the wrongful death of the infant deceased alleged to have been caused by the defendant's breach of a contract made with his father, under conflicting evidence, it is required that the breach of the alleged contract was the proximate cause of the infant's death, and a charge that leaves out this element of the law is reversible error. *Mehaffey v. Construction Co.*, 717.

22. *Same — Contracts — Independent Contractor — Principal and Agent—Scope of Employment.*—In an action to recover damages for the negligent killing by the defendant of plaintiff's intestate, alleged to have been caused by a breach of contract made for his safety, where the evidence is conflicting, and involves the questions of proximate cause, the fact of employment by an independent contractor and whether the negligence occurred after the deceased's duties for the day had terminated: *Held*, a charge that instructs affirmatively the principles of proximate cause as to the defendant's liability under these phases of the case is reversible error to the defendant's prejudice, unless the negative view of the law is also stated. *Ibid.*

23. *Negligence — Instructions — Proximate Cause.*—Where the evidence is conflicting upon the trial of an action to recover damages for an alleged negligent injury received by the plaintiff involving the question of negligence and contributory negligence, it is reversible error for the judge to omit to charge thereunder upon the principle of the proximate cause of the injury sustained, and upon the issue of the plaintiff's contributory negligence. *Rose v. Construction Co.*, 742.

24. *Negligence—Instructions—Proximate Cause—New Trials.*—Where there is evidence tending to show that the plaintiff was injured by the negligence of the defendant's *alter ego* in charge of work in a cut where the plaintiff was engaged in the scope of his employment, by a piece of ice sliding down a mountain slope and striking him, an instruction that does not refer to the question of negligence or proximate cause, is to the defendant's prejudice and reversible error. *Cogdill v. Hardwood Co.*, 745.

25. *Negligence—Highways—Rules of State Highway Commission—Criminal Law—Proximate Cause.*—One walking along a State highway on the right side thereof in violation of a rule of the State Highway Commission, making it a misdemeanor under authority of statute, may recover damages when such violation is not the proximate cause of the injury in suit. *Radford v. Young*, 747.

26. *Negligence—Automobiles—Evidence—Nonsuit.*—In an action to recover damages for an injury negligently caused in a collision by one driving the defendant's auto truck on the highway with plaintiff's automobile, evidence tending only to show that the defendant had loaned the truck to a tenant on his farm to be used for the latter's purposes,

NEGLIGENCE—*Continued.*

upon condition that the tenant have a careful driver, and that accordingly a driver was obtained: *Held,* defendant's motion as of nonsuit thereon should have been granted. *Tyson v. Frutchey,* 750.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 9.

NEWSPAPERS. See Constitutional Law, 4, 8; Libel and Slander, 1; Taxation, 25.

NEW TRIALS. See Criminal Law, 17; Ejectment, 1; Evidence, 15; Highways, 1; Instructions, 1; Judgments, 1; Libel and Slander, 5; Limitation of Actions, 2; Negligence, 24; Tenants in Common, 1; Trials, 1, 2.

NONDELEGABLE DUTY. See Evidence, 6; Master and Servant, 15, 16.

NONRESIDENCE. See Process, 1, 2, 4; Removal of Causes, 4.

NONSUIT. See Actions, 2; Appeal and Error, 22; Criminal Law, 3, 14, 18; Estoppel, 1; Evidence, 4, 5, 6, 8, 9, 14, 17, 19, 21, 23, 24; Intoxicating Liquors, 2; Libel and Slander, 2; Master and Servant, 3, 5, 8, 10, 11, 16; Negligence, 4, 7, 8, 10, 11, 15, 17, 18, 26; Railroads, 3; Trials, 2; Waters and Watercourses, 3.

NOTES. See Mortgages, 2, 6.

NOTICE. See Constitutional Law, 4; Insurance, 1, 7; Partnership, 2; State Highway Commission, 1; Taxation, 9, 20.

NUISANCE.

1. *Nuisance—Waters—Pollution of Stream—Property Rights—Damages—Actions.*—Where the emptying of dye stuffs from a hosiery mill of private ownership, pollutes the stream so as to invade the rights of a lower proprietor on the stream, and also causes the spring on the owner's land, from which he gets his family supply of water, to be unhealthy, and also causes an offensive smell to arise from the plaintiff's pond amounting to a nuisance, and an invasion of his property rights, an action for damages arises to him, the amount to be ascertained by the jury at the time of the trial. *Langley v. Hosiery Mills,* 644.

2. *Same—Permanent Damages—Agreement of Parties.*—Under the facts of this case: *Held,* it not appearing that the damages sought to be recovered arise from permanent conditions, permanent damages are not recoverable, but damages on separate actions accruing from time to time during the continuance of the nuisance may be recovered in the absence of the defendant's agreement for the assessment of permanent damages. *Ibid.*

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 6, 10, 14, 20. 23, 25; Criminal Law, 9; Instructions, 4; Partition, 1; Reference, 4.

OFFICERS. See Banks and Banking, 4; Corporations, 1; Counties, 4; Evidence, 20; Quo Warranto, 1.

OPENING. See Courts, 11.

OPINION. See Appeal and Error, 26; Instructions, 5; Wills, 8.

OPTIONS. See Landlord and Tenant, 2.

ORDERS. See Partition, 6, 7.

ORDINANCES. See Negligence, 5; Taxation, 16.

OVERCHARGE. See Agriculture, 1.

OWNERSHIP. See Railroads, 1.

PARENT AND CHILD. See Actions, 3; Damages, 4; Wills, 6.

PAROL AGREEMENT. See Bills and Notes, 4; Fraud, 3; Mortgages, 5.

PAROL EVIDENCE. See Contracts, 2, 4; Deeds and Conveyances, 4.

PAROL TRUSTS. See Actions, 10; Appeal and Error, 1.

PARTIES. See Actions, 1, 3, 8, 9, 10; Appeal and Error, 3, 20; Banks and Banking, 2, 15, 16; Bills and Notes, 9; Deeds and Conveyances, 6; Equity, 3; Evidence, 6; Highways, 6; Jury, 3; Nuisance, 2; Removal of Causes, 2, 4, 6; Taxation, 9, 25; Trespass, 1; Verdict, 3; Wills, 7, 8.

PARTITION.

1. *Partition — Sales — Report of Commissioners—Objections and Exceptions—Statutes.*—In proceedings for partition of lands under the provisions of C. S., 3245, 3230, requiring the commissioners appointed for the sale of the lands to file their report of the sale, and that if no exception thereto is filed within twenty days the same shall be confirmed, there is no discretion in the court for the judge to order a resale for mistake of facts when the sale has been made in accordance with law, unless the exceptions of the purchaser have been substantially made within the twenty days prescribed. *McCormick v. Patterson*, 216.

2. *Same—Resale—Discretion of Court.*—C. S., 3245, 3230, by the use of the word "shall" makes it a prerequisite to the power of the court to order a resale that exceptions in a recognized legal way be made to the confirmation of the report of the commissioners appointed to sell lands in partition proceedings within the twenty days prescribed therein. *Ibid.*

3. *Same—Substantial Compliance.*—Where three commissioners for the sale of lands in partition proceedings for a division have regularly sold the *locus in quo* as provided by law, and two of them have filed the report of sale, and the other protests against its confirmation upon the ground of a mistake in fact and appears before the clerk and gives his reason therefor within the statutory time, his conduct may amount to a substantial compliance with the statute leaving the matter within the power of the court to order a resale. *Ibid.*

4. *Same—Appeal and Error—Record—Remand.*—Where it does not appear of record in the Supreme Court on appeal whether exceptions have been duly made to the report of the commissioners appointed for the sale of land for partition within the twenty days prescribed by statute, or whether the trial judge has considered the conduct of the purchaser as a substantial compliance with the statutes as to taking exceptions to the report, and the court has ordered a resale of the

PARTITION—*Continued.*

lands, the case will be remanded to the end that such further facts therein be found as will sufficiently present the case for the determination of the Supreme Court. *Ibid.*

5. *Partition—Tenants in Common—Exceptions—Deeds and Conveyances—Estoppel.*—Where the plaintiffs in proceedings to partition lands among tenants in common, except to the report of the commissioners appointed by the court raising an issue as to whether the lands were capable of an actual division or should be sold and the proceeds divided, the plaintiffs are estopped by a deed from one of them to the other conveying a part of the land allotted, from insisting upon their exceptions. *Bland v. Faulkner*, 427.

6. *Same—Interlocutory Orders—Questions of Law—Courts—Appeal and Error.*—The question of whether the commissioners to sell lands in partition had correctly divided them, and also whether the lands were capable of an actual division, are matters of law for the court, upon facts found by him; and where the presiding judge has ordered an issue to be submitted to a jury at a subsequent term to ascertain the true dividing line between certain of the tenants, it is only an interlocutory order which may be disregarded by the judge holding the subsequent term as a matter still within the breast of the court, and does not involve the question as to whether an appeal will lie from one Superior Court judge to another. *Ibid.*

7. *Same—Judgments—Modification—Rescission of Order.*—Interlocutory orders not finally determining or adjudicating the rights of the parties, are under the control of the court and may be amended, modified, changed or rescinded upon good cause shown. *Ibid.*

PARTNERSHIP, See Banks and Banking, 7.

1. *Partnership—Actions—Accounting—Adjustment.*—One partner cannot maintain an action against his copartner for an indebtedness growing out of the relationship of partnership, unless there has been a settlement between them of the partnership business or some sufficient accounting or adjustment by which to determine their respective liability. *Nixon v. Morse*, 225.

2. *Partnership—Dissolution—Notice—Publication—Debtor and Creditor.*—Creditors residing beyond the State who have been selling goods to a partnership doing business in this State, are entitled to notice of the dissolution of the firm beyond that implied by publication in a newspaper published locally to the place wherein the partnership business has been conducted, unless it is made to appear that the seller of goods thereafter to the concern either read the newspaper in which the notice of dissolution appeared, or was reasonably put upon constructive notice by some peculiar circumstances under the conditions existing. *Corporation v. Cooper*, 557.

3. *Same—Evidence—Deeds and Conveyances — Registration.*—The statutory expressed purpose for which a deed or conveyance of property is required to be registered in order to give notice thereof, does not include that of dissolution of a partnership, in this case a deed of trust to the retiring partner, and is incompetent evidence to fix a foreign creditor with notice of its dissolution, and to relieve the retir-

PARTNERSHIP—*Continued.*

ing partner from liability for the indebtedness of the concern to those who thereafter continued to sell its goods, upon the credit of the partnership theretofore existing. *Ibid.*

PAVEMENT. See Municipal Corporations, 2.

PAYMENT. See Banks and Banking, 3; Taxation, 5.

PENALTIES. See Taxation, 24.

PERFORMANCE. See Corporations, 3.

PERSONAL PROPERTY. See Estates, 3; Taxation, 22; Wills, 14.

PETITION. See Highways, 13; Removal of Causes, 8.

PHYSICIANS AND SURGEONS. See Actions, 3; Evidence, 13.

1. *Physicians and Surgeons—State Board of Medical Examiners—Revocation of License—Procedure—Appeal and Error—Questions for Jury.*—The appeal from the State Board of Medical Examiners allowed to a physician whose license has been revoked for immoral conduct in the practice of his profession, follows the procedure allowed in analogous cases, and the intent of the Legislature is interpreted to give a trial *de novo* in the Superior Court wherein the jury are to decide upon the evidence adduced before the facts involved in the issue. C. S., 6618. *S. v. Carroll*, 37.

2. *Physicians and Surgeons — Confidential Relations — Insurance, Life—Evidence — Application for Policy — Misrepresentations — Statutes—Findings of Court—Appeal and Error.*—Before a physician may testify to matters arising in his confidential relationship with his patient, our statute requires that the trial judge find that in his opinion such testimony is "necessary to a proper administration of justice," and in the absence of such finding appearing of record on appeal, it is reversible error for the trial judge upon defendant's exception to admit testimony of the insured's physician tending to show that the insured in his application for life insurance had made misstatements of material facts that would avoid the insurer's liability in his suit to cancel the policy issued thereon. *Ins. Co. v. Boddie*, 199.

PLEADINGS. See Actions, 3; Appeal and Error, 6; Banks and Banking, 4; Bills and Notes, 8; Clerks of Court, 1; Contracts, 5; Damages, 2; Equity, 4; Evidence, 2, 3, 11; Fraud, 2; Judgments, 5; Libel and Slander, 3; Limitations of Actions, 2; Mortgages, 5; Taxation, 6; Trials, 1.

1. *Pleadings—Interpretation.*—Pleadings under our code system are liberally construed, so that actions may be had upon their merits. *Richert v. Supply Co.*, 11.

2. *Pleadings—Evidence—Proof—Highways—Roads and Highways—State Highway Commission—Principal and Surety—Materialmen.*—Where the surety on a contractor's bond given to the State Highway Commission has expressly obligated itself to pay the materialmen and laborers in the terms of the bond given therefor as required by the statute, the surety's liability extends to groceries furnished the contractor for the supply of the men employed only when such are

PLEADINGS—*Continued.*

shown by the evidence to have been necessary under the circumstances of the case, and where the complaint sufficiently alleges the facts tending to show this as a necessity, and there is insufficient evidence to support the allegations, a demurrer to the evidence on the trial will be sustained. *Grocery Co. v. Ross*, 109.

3. *Pleadings—Judgments—Admissions—Demurrer.*—A judgment upon the pleadings on plaintiff's motion is in effect a demurrer to the answer, and every material allegation therein, and every reasonable inference therefrom, are considered on the motion as admitted. *Barnes v. Trust Co.*, 371.

4. *Pleadings—Evidence.*—Matters merely evidentiary upon the issues arising from the pleadings need not be alleged. *Oliver v. Highway Commission*, 380.

5. *Pleadings—Answer—Demurrer—Admissions.*—Where the complaint in condemnation proceedings of a city to acquire lands for street purposes alleges that it had previously and unsuccessfully attempted to acquire by purchase from or negotiation with the owners, the lands necessary for the purpose, and the answer makes allegation to the contrary, plaintiff's demurrer to the answer admits its truth for the purposes of the demurrer, rendering nugatory its allegations of previous unsuccessful attempt to acquire by purchase or negotiations. *Winston-Salem v. Ashby*, 388.

6. *Pleadings—Demurrer—Admissions—Matters of Law.*—A demurrer to the complaint tests the sufficiency of its allegations and reasonable inferences of fact therefrom to constitute a cause of action, and do not extend to conclusions or inferences arising therefrom as matters of law. *S. v. Bank*, 436.

7. *Pleadings—Bill of Particulars—Motions.*—Where the pleading objected to is sufficient in law, the party should aptly move for a bill of particulars to obtain more detailed information as to the matters alleged. *Gore v. Wilmington*, 450.

8. *Pleadings—Demurrer Ore Tenus—Statutes.*—A demurrer to the complaint *ore tenus* must distinctly specify the grounds of objection or it may be disregarded. *Seawell v. Cole*, 546.

9. *Same — Appeal and Error — Courts — Ex Mero Motu.*—The Supreme Court may, *ex mero motu*, look into the record to ascertain if the complaint sufficiently alleges a cause of action. *Ibid.*

10. *Same — Pleadings Liberally Interpreted.* — Upon the inquiry as to whether the complaint states a cause of action, it will be liberally construed with every reasonable intendment therefrom in the plaintiff's favor, however uncertain, defective and redundant its allegations may be drawn. *Ibid.*

11. *Pleadings—Enlarging Time—Courts—Discretion—Statutes.*—The judge of the Superior Court where a civil action has been brought has the discretionary power to enlarge the time in which an answer may be filed to the complaint beyond that limited before the clerk, upon such terms as may be just, by an order to that effect. C. S., 536; Public Laws 1921, Ex. Ses., ch. 92; Public Laws 1923, ch. 53; Public Laws 1924, Ex. Ses., ch. 18. *Aldridge v. Insurance Co.*, 683.

PLEADINGS—*Continued.*

12. *Pleadings — Demurrer — Admissions.* — A demurrer to the complaint admits only the facts properly alleged, and not the legal conclusions inferable therefrom. *Lane v. Graham County*, 723.

POISON. See Criminal Law, 18.

POLICE POWER. See Constitutional Law, 12.

POLICY. See Insurance, 2, 3, 4, 5, 6, 7; Physicians and Surgeons, 2.

POLLING JURY. See Jury, 1; Verdict, 2, 5.

POLLUTION. See Nuisance, 1; Waters and Watercourses, 3.

POSSESSION. See Intoxicating Liquors, 2, 5.

POWERS. See State Highway Commission, 2.

PRACTICE. See Actions, 4.

PREJUDICE. See Instructions, 1; Jury, 6.

PREMATURE APPEALS. See Appeal and Error, 6.

PREMEDITATION. See Homicide, 2.

PREMIUMS. See Insurance, 1; Mechanics' Liens, 2.

PREREQUISITES. See Eminent Domain, 1.

PRESUMPTION. See Constitutional Law, 3; Criminal Law, 9; Divorce, 1; Fraud, 2; Highways, 7; Husband and Wife, 1, 2; Wills, 4.

PRICE. See Vendor and Purchaser, 1.

PRINCIPAL AND AGENT. See Banks and Banking, 8; Bills and Notes, 11; Contracts, 2; Counties, 1; Evidence, 12; Insurance, 4, 5, 6, 7, 8, 9, 10; Libel and Slander, 4, 5; Negligence, 22; Schools, 3; Sheriffs, 1; Taxation, 3.

1. *Principal and Agent — Contracts, Written — Lands — Deceit—Fraud—Actions.*—For an electric power transmission company to obtain a valid right with the agent of the owner, to enter upon the lands of the owner and erect its poles, etc., for the transmission of its current, it is required that the authority of the agent, to bind his principal, must be in writing, and where the power company, with the knowledge of the facts, expressed or implied, has erected its poles, etc., without the written authority of agency conferred, and the wife, the owner of the lands, repudiates the acts of the husband, acting as her agent, and causes the power company to remove them from her lands, a civil action for damages founded on deceit against the husband will not lie. *Electric Co. v. Morrison*, 316.

2. *Principal and Agent—Contracts—Scope of Employment—Negligence—Respondeat Superior—Independent Contractor.*—Where under a contract with a local dealer a refining company is to supply the latter with gasoline to be sold at a price to be named by it with a fixed compensation to the dealer, the latter to effect delivery to his customers at his own expense: *Held*, the refining company is not responsible in damages for the negligent death of plaintiff's intestate caused by the

PRINCIPAL AND AGENT—*Continued.*

dealer's delivering to him for repairs a gasoline tank partly filled with gasoline, it having no control over or interest in the means or methods used in respect to the act complained of, or falling within the scope of the dealer's employment or within the principle usually applying in matters of agency: *Held further,* the doctrine of independent contractor does not apply under the provisions of the contract in suit. *Inman v. Refining Co.,* 566.

PRINCIPAL AND SURETY. See Mechanics' Liens, 1; Pleadings, 2.

PRINTING. See Appeal and Error, 12.

PRIORITIES. See Banks and Banking, 2; Equity, 3.

PRIVILEGED COMMUNICATIONS. See Libel and Slander, 4, 5.

PRIORITY OF LIENS. See Deeds and Conveyances, 8.

PROCEDURE. See Actions, 4; Criminal Law, 26; Highways, 7; Physicians and Surgeons, 1.

PROCESS. See Appeal and Error, 11; Estates, 2.

1. *Process—Summons—Publication of Summons—Attachment—Nonresidents.*—Where the real and personal property of a nonresident mortgagor has been attached for the purpose of a valid service of summons issued out of the courts of this State, as to whether the mortgagor may depend as to the real property upon the ground that it was subject to a mortgage lien of another not a party, *quere?* and *held,* the possession here of personal property by the defendant is sufficient for jurisdictional purposes. *Kenney v. Hotel Co.,* 44.

2. *Process—Summons—Nonresidents—Service—Attachment—Courts—Jurisdiction—Judgments.*—Where a service of summons cannot be personally had upon a nonresident or his agent sufficient for the purpose, it is necessary to a valid service by publication that he has property within the jurisdiction of our court, and that the same be attached in order to confer the jurisdiction, and in that case a judgment in *personam* has no effect, but only one *in rem* is valid. *Adams v. Packer,* 48.

3. *Process—Service—Lunacy—Judgments—Constitutional Law—Faith and Credit.*—Where judgment by default for want of an answer has been rendered in another State, it is insufficient to set it aside here for lack of service of summons, that the defendant had been confined in an asylum under an inquisition of lunacy, when it is further made to appear that he had been discharged and was in his right mind when the summons in the action was served upon him, and had employed an attorney to defend the suit, who did not file the answer, in consequence of which the default judgment had been entered. *Ring v. Whitman,* 544.

4. *Process—Summons—Publication—Attachment—Nonresident—Animus Revertandi.*—One who has left the State for an indefinite time, his return depending upon a doubtful contingency, is a nonresident for the purpose of service of summons by publication and attaching his property in this State in order to bring him under the jurisdiction of our

PROCESS—*Continued.*

courts, and his motion made by special appearance to vacate the attachment on this ground will be denied. C. S., 484(3), 799(2). *Brann v. Hanes*, 571.

5. *Same—Lien of Attachment—Courts—Jurisdiction.*—Where the service by publication and attachment on a defendant absent from the State comes within the provisions of C. S., 484(3), 799(2), and thereunder his property here has been attached as required to give validity to the publication of service, he may submit himself to the jurisdiction of the court and relieve his property of the levy in attachment. *Ibid.*

PROOF. See Pleadings, 2.

PROPERTY. See Mortgages, 2; Nuisance, 1; Religious Societies, 2; Taxation, 5.

PROTEST. See Highways, 6.

PROXIMATE CAUSE. See Negligence, 5, 16, 17, 20, 21, 22, 23, 24, 25; Telegraphs, 3.

PUBLICATION. See Appeal and Error, 11; Constitutional Law, 4; Partnership, 2; Process, 1, 4; Taxation, 25.

PUBLIC BENEFIT. See Highways, 15.

PUBLIC BUILDINGS. See Mechanics' Liens, 1.

PUBLIC POLICY. See Bills and Notes, 7; Statutes, 3.

PUBLIC SCHOOLS. See Indictment, 2; Schools.

PURCHASERS. See Banks and Banking, 3; Estates, 2; Intoxicating Liquor, 1; Taxation, 21; Wills, 1.

QUESTIONS AND ANSWERS. See Appeal and Error, 9.

QUESTIONS FOR JURY. See Actions, 6; Banks and Banking, 14; Bills and Notes, 1; Contracts, 6; Criminal Law, 1; Damages, 1; Evidence, 7, 9, 10; Intoxicating Liquors, 2; Libel and Slander, 2, 5; Master and Servant, 8; Negligence, 2, 10, 11, 18; Physicians and Surgeons, 1, 11.

QUESTIONS OF LAW. See Appeal and Error, 16; Constitutional Law, 16; Contracts, 1; Damages, 1; Highways, 4; Judgments, 2; Partition, 6; Pleadings, 6.

QUO ANIMO. See Criminal Law, 15.

QUO WARRANTO.

1. *Quo Warranto—Title—Public Office—Actions—Statutes.*—A civil action in the Superior Court is the proper procedure to try the title to a public office between two rival claimants, when one of them is in possession under a claim of right and exercising the official functions thereof. C. S., 2671. *S. v. Carter*, 293.

2. *Same—Elections—Burden of Proof.*—The burden of proof is on the plaintiff in *quo warranto* to show that the one in possession was not entitled thereto by reason of a number of unlawful votes that had been

QUO WARRANTO—*Continued.*

cast for him, and that otherwise the plaintiff would be entitled thereto, and this is not shown when by rejecting certain votes cast for the defendant an even number of votes had been cast for each one. C. S., 2671. *Ibid.*

3. *Same—Domicile.*—Where the plaintiff in an action in the nature of *quo warranto* to try title to a local public office within the county, has shown that each party had received the same number of votes for the office and depends upon the illegality of one of the votes cast for the present incumbent, evidence tending to show that this voter was domiciled or resident in another county and had only a temporary residence in that of the election, with the *animus revertandi,* is erroneously excluded. *Ibid.*

4. *Same—Constitutional Law—Statutes.*—Under our Constitutional provisions, Art. VI, secs. 2 and 3, as to the qualifications of voters and the time of their residence at the place of the election held, requiring registration, etc., and the statutes passed in pursuance thereof, C. S., 2654, 2665, the qualification of voters in a municipal election is the same as in a general one, and applies in an action in the nature of a *quo warranto* to try the title to the office of mayor of a town when contested by a rival claimant. *Ibid.*

5. *Same—Residence—Animus Revertandi.*—In order for a voter to cast his ballot in a municipal election to the office of mayor of the town, it is necessary for the contestant to show where there is a tie vote between two rival claimants that the domicile of a voter, whose vote will vary the result, was elsewhere, and it may be shown by direct or circumstantial evidence that in fact his domicile or residence was not at the place he had cast his vote, but at another place, with the *animus revertandi. Ibid.*

RAILROADS. See Carriers, 1, 2; Master and Servant, 1, 5; Negligence, 10, 11, 13, 19.

1. *Railroads—Eminent Domain—Easements—Rights of Way—Damages—Compensation of Owners of Land—Courts.*—Where a railroad company organized under the law of another State is authorized under its charter to acquire lands for railroad purposes, which may be "necessary" or wanted for building a railroad, and by statute in this State it is given the same right of condemnation as it had under its charter, with "all the general powers that are by statute concerning corporate companies conferred on corporations," and the railroad company has in pursuance of this restrictive right entered upon the plaintiff's land and continuously occupied a right of way of a certain width; and no agreement having been made with the owners as to the amount of compensation, such owners bring action to have the amount ascertained, and have been paid accordingly: *Held,* the compensation paid to the owners was only for the width of the restricted right of way originally taken, and the general statute presuming that the right of way taken thereunder would extend "not less than eighty nor more than one hundred" feet, has no application either in favor of the original railroad or its successors in title as affecting the width of the right of way originally taken under its charter. *Dowling v. R. R.,* 488.

RAILROADS—*Continued.*

2. *Same—Suits—Cloud on Title—Equity—Anticipatory Damages—Courts.* —In this suit to remove a cloud upon the title to plaintiff's land: *Held*, under the exceptions presented by plaintiff's appeal, a new trial will not be granted, as they are based on an anticipatory occurrence, which has not happened. *Ibid.*

3. *Railroads—Negligence—Contributory Negligence — Crossings—Automobiles—Rule of the Prudent Man — Evidence — Nonsuit.*—Where the entire evidence tends to show, in an action by an administrator against a railroad company to recover damages for the negligent killing of his intestate, that the intestate had stopped at the crossing of a highway with two railroad tracks paralleling each other, for the passage of a freight train before driving his automobile across, and then endeavored to cross and was struck by another train passing on the second track, the evidence however being conflicting as to whether this train was giving the proper signals of warning required at the place, and that the driver of the automobile could have seen the second train in time to have avoided the injury had he looked, listened or had stopped and observed before attempting to cross, and was killed by this passing train: *Held*, the defendant's motion as of nonsuit should have been sustained on the issue of contributory negligence; nor is the principle affected by plaintiff's evidence in rebuttal, given by a witness who was not present at the time, and who afterwards went there for observation, that the plaintiff could not have seen or been aware of the approach of the train that killed him, testified upon the hypothesis that under the circumstances the smoke from and the noise of the trains, would have prevented his being aware of the facts, against the direct testimony of eye witnesses who made no mention as to this circumstance. *Harrison v. R. R.*, 656.

4. *Same—Stop, Look, Listen—Degree of Care Required of Plaintiff.*—The driver of an automobile, under the rule of the prudent man, is required to observe due care before driving across a railroad track, as the apparent circumstances at the time may reasonably require for his own safety, and under certain circumstances, he should not only stop his car before entering upon the railroad's right of way, but alight therefrom and make further investigation, and his failure to do so may render his contributory negligence in that respect the cause without which the injury complained of would not have occurred, and entirely bar his recovery of damages in his action. *Ibid.*

RATIFICATION. See Constitutional Law, 3; Corporations, 2; Statutes, 2.

REAL ESTATE AGENTS. See Taxation, 3.

REAL PROPERTY. See Taxation, 22.

REASONABLE DOUBT. See Criminal Law, 9, 21.

RECEIVERS. See Banks and Banking, 1, 2; Bills and Notes, 9.

RECORD. See Appeal and Error, 18, 19, 21, 29.

RECORDS. See Partition, 4.

REFERENCE. See Agriculture, 1; Appeal and Error, 15, 16; Costs, 2.

1. *Reference—Findings of Fact—Evidence—Appeal and Error.*—Neither the findings of fact of the referee, approved by the trial judge nor his independent action thereon, is reviewable on appeal when supported by legal evidence. *Kenney v. Hotel Co.*, 44.

2. *Reference—Boundaries—Dividing Line—Statutes.*—A compulsory reference may be ordered by the trial judge in an action involving the true location of a dividing line between the owners of adjoining lands, in an action of trespass, and the wrongful cutting of timber, where the location of the line is complicated or requires a personal view of the premises. C. S., 573(3). *Waller v. Dudley*, 139.

3. *Reference—Trials—Jury—Waiver—Issues.*—Where on the appellant's motion the trial court orders a reference, the appellant's right to a jury trial upon issues submitted on exceptions duly taken is to be deemed waived, and in this case it is *held*, that the issues thus submitted were not sufficiently controverted by the adversary party. *Trust Co. v. Pumpelly*, 580.

4. *Reference — Objections and Exceptions — Issues — Trial by Jury.* — A party duly and aptly excepting to an order of reference, and also to the admissions of evidence before the referee, and submitting issues, secures his right thereby to a trial by jury upon the issues presented by him. *Brown v. Buchanan*, 675.

REFORMATION OF INSTRUMENTS. See Evidence, 10; Vendor and Purchaser, 2.

REGISTER OF DEEDS. See Equity, 3.

REGISTRATION. See Deeds and Conveyances, 8; Partnership, 3.

REINVESTMENT. See Wills, 6.

RELATIONSHIP OF JUROR. See Jury, 6.

RELIGIOUS SOCIETIES.

1. *Religious Societies—Rules—Government.*—Where, upon sufficient evidence, the jury finds that the rule of the Primitive Baptist Churches that when a member has been excluded from one church he cannot unite with another of the same faith without first being restored by the church of which he had been a member, is a fundamental rule and usage of all churches of that faith, the observance of this rule is mandatory on all congregations adhering to the Primitive Baptist faith. *Dix v. Pruitt*, 64.

2. *Same—Control of Property.*—The authority of a local Primitive Baptist church is limited by the fundamental rules, doctrines, and usages of the denomination to which it belongs, and when a group in a local congregation act in opposition to such rules, doctrines, and usages, though they are in the majority, they *ipso facto* withdraw from the lawful organization of the church and forfeit the control and use of the church property to the group which abides by the fundamental rules, doctrines, and usages. *Ibid.*

REMEDIES. See Wills, 1.

REMAND. See Agriculture, 1; Appeal and Error, 29; Partition, 4; Schools, 3.

REMOVAL OF CAUSES. See Actions, 2.

1. *Removal of Causes—Federal Courts—Municipal Corporations—Cities and Towns—Condemnation of Lands—Actions at Law—Court's Jurisdiction.*—Proceedings by the commissioners of an incorporated town to take the property of a nonresident respondent for a public use are administrative and not judicial until the amount of compensation has been awarded, and the cause regularly transferred to the trial docket upon the respondent's exception to the amount of damages so assessed, and upon a proper petition and bond of the respondent for the removal of the cause to the Federal Court for the appropriate district, filed in apt time before the clerk, without any act amounting to a waiver of his right, showing his nonresidence, the diversity of citizenship and his claim that the amount of his damages comes within the jurisdictional amount required by the Federal Removal Statute, the cause is accordingly properly removed. *Waynesville v. Smathers,* 131.

2. *Removal of Causes — Federal Courts — Parties — Nominal Parties—Courts — Jurisdiction.* — Where a nonresident defendant seeks to remove a cause from the State to the Federal Court for diversity of citizenship, the plaintiff's joinder of purely nominal party will not oust the jurisdiction of the Federal Court, and alone is insufficient to defeat the defendant's motion to remove the case under the Federal statute. *Allred v. Lumber Co.,* 547.

3. *Same—Trusts—Trustees—Actions—Contracts—Damages.*—Where resident plaintiffs bring an action for damages *ex contractu,* and likewise seek to enjoin the sale of lands under a power given by a deed of trust, the joinder of the trustee is of a mere nominal party, and will not prevent the defendant's motion to remove the cause to the Federal Court for diversity of citizenship. *Ibid.*

4. *Removal of Causes—Courts — Jurisdiction—Diverse Citizenship—Federal Courts — Parties — Fraudulent Joinder — Nonresidence.*—In an action against a nonresident railroad company and its resident claim agent, in a personal injury case, to set aside for fraud a release from liability obtained from the plaintiff and to recover an adequate compensation for the injury: *Held,* upon the defendant's petition to remove the cause from the State to the Federal Court for diversity of citizenship under the Federal statute, the question of the diversity of citizenship and fraudulent joinder of the resident defendant, is to be determined by the Federal Court when the facts are sufficiently and properly alleged upon the petition for its removal, it thereby appearing that the claim agent was without interest in the result of the controversy except in his limited representative capacity, or only a formal party, and the refusal to order the controversy removed accordingly is reversible error. *Killian v. Hanna,* 193 N. C., 17, cited and distinguished. *Ferris v. R. R.,* 653.

5. *Removal of Causes—Transfer of Causes — Venue — Statutes—Nonresidents—Transitory Actions.*—The venue of a civil action is regulated by statutes passed usually with regard to the convenience of the parties litigant, and the principle of venue in transitory actions has now but little value. *Palmer v. Lowe,* 703.

REMOVAL OF CAUSES—*Continued.*

6. *Same—Rights of Sole Resident Defendant—Parties—Residence.*—Where a nonresident plaintiff brings action against a corporation existing under the laws of another State, with the joinder of a resident defendant of this State, and the venue in the action is laid here in a different county from that of the resident defendant, to recover damages alleged to have been caused by a negligent act, the venue is in the county of the resident defendant, C. S., 469, and is removable thereto upon his motion duly made. C. S., 467, 468, 463 not applying. *Ibid.*

7. *Removal of Causes — Diverse Citizenship — Severable Controversy—Fraudulent Joinder.*—Upon a motion to remove a cause from the State to the Federal Court, the question of severable controversy will be determined in the State court from the facts as alleged in the complaint, and upon the question of fraudulent joinder of a resident defendant, the undisputed facts of the matter must unerringly lead to the legal conclusion that the moving defendant has the right under the Federal removal act. *Cowart v. Lumber Co.*, 787.

8. *Removal of Causes—Petition—Amendments.*—Amendments to a petition for removal of a cause from the State to the Federal Court does not defeat movant's right when motion to amend is made in apt time. *Newton, Admx., v. Tobacco Co.*, 816.

RENEWALS. See Contracts, 4.

RENT. See Landlord and Tenant, 1.

REPAIRS. See Carriers, 2.

REPEAL. See Taxation, 11.

REPORT. See Partition, 1.

REPRESENTATIONS. See Insurance, 4.

REPUTATION. See Evidence, 25.

REQUESTS. See Appeal and Error, 3; Criminal Law, 9; Instructions, 4, 6, 10.

RESALE. See Partition, 2.

RESCISSION. See Partition, 7.

RESERVATIONS. See Deeds and Conveyances, 12.

RES GESTAE. See Municipal Corporations, 1.

RESIDENCE. See Deeds and Conveyances, 1; Quo Warranto, 5; Removal of Causes, 6; Taxation, 5.

RES JUDICATA. See Judgments, 6; Mortgages, 4.

RESPONDEAT SUPERIOR. See Principal and Agent, 2; Sheriffs, 1.

RESTRICTIONS. See Deeds and Conveyances, 1.

RETRAXIT. See Constitutional Law, 8; Libel and Slander, 2.

RETROSPECTIVE LAW. See Constitutional Law, 1.

REVERSAL. See Appeal and Error, 8; Criminal Law, 13, 24, 25; Evidence 13; Judgments, 2; Jury, 5; Negligence, 13.

REVIEW. See Appeal and Error, 11, 14, 15, 16, 19; Constitutional Law, 10; Jury, 7.

REVOCATION. See Physicians and Surgeons, 1.

RIGHTS. See Nuisance, 1.

RIGHTS OF RESIDENT DEFENDANT. See Removal of Causes, 6.

RIGHTS OF WAY. See Railroads, 1.

ROADS AND HIGHWAYS. See Highways.

RULES. See Negligence, 14; Religious Societies, 1.

RULES OF COURT. See Appeal and Error, 12, 17, 18; Certiorari, 2; Courts, 2.

RULE OF HIGHWAY COMMISSION. See Negligence, 25.

RULE OF PRUDENT MAN. See Highways, 1; Negligence, 6; Railroads, 3.

SAFE INSTRUMENTALITIES. See Evidence, 7; Master and Servant, 12, 14.

SAFE PLACE TO WORK. See Evidence, 5; Master and Servant, 4, 12, 14; Negligence, 1, 2, 4.

SALES. See Judicial Sales, 1; Mortgages, 7.

1. *Sales—Mortgages—Deeds of Trust—Statutes—Increased Bids — Commissions.*—Where lands have been sold by a trustee in a deed of trust securing the payment of a note, in accordance with the power of sale in the instrument, and under the provisions of C. S., 2591, the amount it brought at the sale has been raised, it is within the authority of the clerk of the court to allow the commission provided for in the deed to the extent of the advanced price, when reasonable, against the claims of subsequent lienors or claimants. *In re Hollowell Land*, 222.

2. *Same—Appeal and Error.*—The allowance to the commissioner to sell lands securing a note for a loan made by the clerk of the court may be reviewed as to its reasonableness by the judge on appeal, and *held* under the circumstances of this appeal, the commission of 5 per cent was not unreasonable. *Ibid.*

SCHOOLS. See Constitutional Law, 2, 6; Mechanics' Liens, 1; Indictment, 2; Taxation, 12.

1. *Schools—Taxation—Statutes—Counties—Bonds Issued by County in Behalf of School District.*—Where a constitutional statute provides for the issuance of bonds for public school purposes of a district therein and a tax upon that district from which the bonds, principal and interest, shall be paid, and no other, and does not expressly name the payer of the bonds, but authorizes and directs the board of county commissioners to issue the bonds, which shall be signed by the chairman, attested by the clerk and impressed with the corporate seal of the county: *Held*, it was the intent of the Legislature, as construed from the act, that the bonds be issued in the name of the county on

SCHOOLS—*Continued.*

behalf of the school district without liability on the part of the county, but to be paid only as the act expressly provides, out of the money received from the tax imposed for the purpose on the poll and property of the designated school district. *Comrs. of McDowell v. Bond Co.*, 137.

2. *Schools—Taxation—Bonds—Elections—Statutes—Constitutional Law—County Finance Act.*—When required for the establishment or maintenance of a six-months term of the State system of public schools, in accordance with the provisions of the State Constitution, it is not necessary that the question of issuing bonds by a county therefor be first submitted to the voters for the validity of the bonds, under the provisions of the County Finance Act. Const., Art. VI, sec. 7. *Hall v. Comrs. of Duplin*, 768.

3. *Same—Government—Principal and Agent—Appeal and Error—Material Facts—Remand.*—Where a county proposes to issue bonds for the erection and maintenance of its public schools under the provisions of the County Finance Act, without submitting the question to its voters, it must be shown that the county was acting as the administrative agent of the State in providing a State system of public schools, and that the erection and purchase of the schoolhouses contemplated is necessary for a six-months school term in the county, and where on appeal the record does not disclose such findings, the case will be remanded. *Ibid.*

4. *Schools—Taxation—Petition of Voters—Statutes—Bonds.*—As affecting the validity of bonds involving the levy of a tax for school purposes by a special school district, in accordance with 3 C. S., 5639, it is necessary that a petition be filed in substantial compliance with the terms of the statute. *Young v. Comrs. of Rowan*, 771.

5. *Same—Petition of Voters Not a Prerequisite.*—The provisions of 3 C. S., 5669, that the election shall be called and held under the same rules and regulations as provided in Public Laws of 1923, subchapter 8, for local tax elections, means that the election shall be authorized and conducted in accordance with the rules and regulations prescribed in subchapter 8, and does not include within its meaning the signing of the petition by the voters as required by 3 C. S., 5639. *Ibid.*

SCIENTER. See Criminal Law, 15.

SCOPE OF AUTHORITY. See Negligence, 22.

SEDUCTION. See Actions, 1; Husband and Wife, 3, 4, 5, 6.

1. *Seduction—Married Women—Voluntary Submission—Support—Actions.*—An action by a married woman for damages caused by seduction of her virtue by the defendant will not lie when it is made to appear that she yielded to him under his promise to provide for her and her husband who was disabled from earning a support for them. *Hyatt v. McCoy*, 25.

SEIZURE. See Tenants in Common, 1.

SELF-DEFENSE. See Criminal Law, 1; Homicide, 1, 5.

SENTENCE. See Criminal Law, 11, 24, 25; Judgments, 11.

SERVICE. See Appeal and Error, 11; Estates, 2; Process, 2, 3.

SET-OFF. See Equity, 5.

SETTLEMENT. See Insurance, 2.

SHAREHOLDERS. See Banks and Banking, 10; Corporations, 2.

SHERIFFS. See Deeds and Conveyances, 2; Taxation, 25.

1. *Sheriffs—Special Deputies—Principal and Agent—Damages—Respondeat Superior—Criminal Law—Homicide—Accident.*—The civil liability of a sheriff for the accidental killing of a bystander by his special deputy while attempting to arrest one for the violation of the criminal law, by shooting at and missing the supposed but unidentified offender under a John Doe warrant, depends upon the question as to whether the special deputy was acting officially at the time within the authority deputized, and where the evidence discloses only that he had been appointed a special deputy without defining his duties, and had sworn out the warrant in his own name, and was acting without the knowledge of the sheriff, and the killing happened to a bystander in attempting to make the arrest, it is not sufficient to make the sheriff liable in damages therefor. The authority of a sheriff to appoint deputies and their powers stated by BROGDEN, J. *Hanie v. Penland,* 234.

SIDETRACKS. See Carriers, 2.

SIGNALS. See Evidence, 8; Highways, 1.

SLANDER. See Libel and Slander.

SPEED. See Negligence, 7.

SPIRITUOUS LIQUORS. See Criminal Law, 23; Indictment, 1; Intoxicating Liquor.

STATE. See Criminal Law, 20.

STATE BOND. See Taxation, 19.

STATE HIGHWAY COMMISSION. See Highways, 2, 5, 6, 9, 11, 12; Injunction, 1; Pleadings, 2.

1. *State Highway Commission—Roads and Highways—Appeal and Error—Notice of Appeal—Assessments—Damages—Statutes.*—Where lands are taken by the State Highway Commission for the construction of a State highway, on appeal from the assessment of damages by a board of appraisers duly appointed to investigate them, the clerk is required by statute, C. S., 633, to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. *Sneed v. Highway Commission,* 46.

2. *Same—Courts—Supervisory Powers.*—Where the clerk has failed to transmit the record to the court on appeal for damages assessed by the appraisers in the taking of lands for a State highway, upon notice of appeal given in proceedings under the provisions of C. S., 633, 634, the trial judge within his supervisory power may order that this be done. *Ibid.*

STATUTES. See Actions, 2, 5; Agriculture, 1; Appeal and Error, 7, 20; Banks and Banking, 3, 4, 7, 10, 14, 15, 16; Bills and Notes, 10; Certiorari, 2; Constitutional Law, 1, 3, 6, 7, 8, 11, 12, 20; Costs, 1; Counties, 1; Courts, 2, 10; Criminal Law, 3, 6, 18; Deeds and Conveyances, 2, 5, 9; Divorce, 1; Eminent Domain, 1; Equity, 1, 11; Estates, 2; Evidence, 14, 16, 18, 19, 21; Fraud, 5; Highways, 2, 6, 9, 11; Indictment, 2; Instructions, 5, 6, 7, 9; Insurance, 1, 3; Intoxicating Liquors, 1, 2; Judgments, 4, 5; Partition, 1; Physicians and Surgeons, 2; Pleadings, 8, 11; Questions for Jury, 9; Quo Warranto, 1, 4; Reference, 2; Removal of Causes, 5, 6; Sales, 1; Schools, 1, 2, 4, 5; State Highway Commission, 1; Taxation, 1, 2, 3, 4, 6, 10, 12, 14, 15, 16, 17, 19, 20, 26; Verdict, 6; Wills, 4, 8.

1. *Statutes — Amendments — Taxation — Bonds — Counties.* — Where the Legislature has passed an act, according to the provisions of our Constitution, Art. II, sec. 14, authorizing a county to issue bonds, unless it is made to appear to the contrary, an act ratified several days later presumes a legislative intention to regard the first act as continuing within its contemplation, subject to amendment. *Graham County v. Terry*, 22.

2. *Same—Constitutional Law—Taxation — Counties—Bonds—Elections—Ratification by Electorate.*—Where the Legislature has passed an act authorizing a county to issue bonds according to the provisions of Const., Art. II, sec. 14, it is within its power to add a provision that the question be first submitted to the electorate of the county in order to the validity of the proposed bonds. *Ibid.*

3. *Statutes—Public Policy—Intent—Interpretation.*—As a matter of public policy the general Municipal Finance Act should be liberally construed to effectuate its intent. *Hartsfield v. Craven County*, 358.

4. *Statutes — In Pari Materia — Interpretation — Repugnancy.*—3 C. S., 2792(b) amending the statute relating to the acquisition by a city of lands necessary for street purposes, in this case for widening its streets, should be construed *in pari materia*, with the other sections relating to the subject so as to reasonably harmonize them, and when so construed, the provision of this section is in harmony with that part of section 2792, requiring that before taking by condemnation the city must first endeavor to acquire the necessary lands by purchase or negotiation with the several owners. C. S., 1715. *Winston-Salem v. Ashby*, 388.

5. *Statutes — Interpretation — In Pari Materia — Taxation — Counties — Bonds.*—A general act of the Legislature relating to the funding of a county indebtedness by the issuance of county bonds, and a public-local law relating especially to a county upon the same subject-matter passed at the same session of the Legislature, and both ratified on the same day, should be construed together as being *in pari materia*. *Comrs. of McDowell v. Assell*, 412.

6. *Statutes—Fraud—Worthless Checks.*—The issuance of a check on a bank in violation of our "Worthless Check Law," is a false representation of subsisting facts that the maker has on deposit sufficient funds for its payment at the bank, upon its presentation, or that he has made the necessary arrangements with the bank therefor, and is in effect a fraud upon the payee, the payee accepting it in good faith. *S. v. Yarboro*, 498.

STATUTE OF FRAUDS. See Contracts, 2; Fraud, 3, 4, 5.

STENOGRAPHERS' FEES. See Costs, 2.

STIPULATIONS. See Telegraphs, 6, 7.

STOCK. See Banks and Banking, 3.

STOP, LOOK, LISTEN. See Railroads, 4.

STREETS. See Deeds and Conveyances, 9; Municipal Corporations, 2.

STREET RAILWAYS. See Negligence, 16.

STREETS AND SIDEWALKS. See Eminent Domain, 1; Waters and Watercourses, 1.

SUBMISSION. See Seduction, 1.

SUBTERRANEAN WATERS. See Waters and Watercourses, 3.

SUITS. See Costs, 1; Equity, 1, 3; Railroads, 2.

SUMMONS. See Process, 1, 2, 4.

SUPERIOR COURT. See Appeal and Error, 5; Wills, 13.

SUPPORT. See Seduction, 1.

SUPREME COURT. See Courts, 8; Vendor and Purchaser, 2.

SURFACE WATERS. See Waters and Watercourses, 1.

SUSPENSION. See Criminal Law, 11; Judgments, 2.

TAXATION. See Constitutional Law, 2, 7; Deeds and Conveyances, 2; Highways, 13; Schools, 1, 2, 4, 5; Statutes, 1, 2, 5.

1. *Taxation—Statutes—Calendar Year—Fiscal Year—Liens.*—By express provisions of our statute, C. S., 3949(3), the month, in its relation to the time taxes on real estate shall be due by the owner of lands, means the calendar month as distinguished from the lunar month, and applies to the fiscal year. *Shaffner v. Lipinsky*, 1.

2. *Taxation — Statutes — Interpretation — In Pari Materia—Vendor and Purchaser—Deeds and Conveyances—By Whom Taxes Are Chargeable.*—Ch. 101, Laws 1925, making the lien for taxes to attach 12 May, the Machinery Act, ch. 102, Art. 3, sec. 44, requiring that the taxpayer shall return all real and personal property to the list-taker, owned by him 1 May, and sec. 59(3), applying these provisions to cities and towns, and sec. 88, requiring the sheriff to account to the county treasurer, etc., are *Held* to be *in pari materia* with C. S., 3949(3), and that in the sale of real property during the fiscal year the vendor is chargeable as against his vendee for the State, county, and city taxes accruing up to 1 May, following the date of his conveyance; and the vendor with those due for the remainder of the fiscal year ending 30 April. *Ibid.*

3. *Taxation—License Tax—Principal and Agent—Sales—Commissions—Statutes—Real Estate Agents.*—A real estate agent may not recover his commission from the owner in making a sale when he has not

TAXATION—*Continued.*

paid his license tax as required by our statute, Public Laws 1925, ch. 101, but in the action it must be shown that the services rendered come within the meaning of the statute. *Roberts v. Burton*, 19.

4. *Taxation—Counties — Bonds — Constitutional Law—Statutes—Amendments.*—Where the Legislature has passed an act authorizing a county to pledge its faith and credit in the issuance of bonds upon its several readings, upon its aye and no vote in accordance with Art. II, sec. 14, of the State Constitution, and by later ratification of an act requiring the question to be submitted to the qualified voters: *Held*, it is not required that the later ratified act be also passed in accordance with the constitutional requirement, and in the absence of a proper election, the bond issue will be declared invalid. *Graham County v. Terry*, 22.

5. *Taxation—Intangible Property—Where Payable—Residence—Domicile.*—Under the provisions of C. S., 7912, where a person has not resided in the place of his domicile, his solvent credits and intangible property should be listed for taxation and are payable at the place in which he has dwelt for the longest period of time during the year preceding the first of May, and where the fact is established that he has dwelt for fourteen continuous years preceding that date in a county different from his domicile, his taxes for such property are properly listed and payable in the former place. *Ransom v. Comrs. of Weldon*, 237.

6. *Taxation—Counties—Actions—Recovery of Illegal Taxes Paid—Pleadings—Allegations—Statutes.*—In order to recover money paid under protest to the sheriff as taxes on land within the county, it is necessary to allege that the taxes sought to be recovered were illegally imposed or unlawfully collected, and in the absence of such allegation an injunction against the sale of the land for the payment of the taxes due will be denied. C. S., 7979. *Hunt v. Cooper*, 265.

7. *Same—Extension of Time to Collect Back Taxes.*—The Legislature has the power to enact a law to extend the time to the sheriff for the collection of taxes due in the past, and to foreclose upon the land for that purpose, and where the owner has neglected to pay them such owner may not pay under protest and recover them, or successfully seek injunctive relief against the sheriff's sale, in the absence of allegation that the taxes collected by the sheriff were illegal or unlawfully collected. 3 C. S., 8005(a), (b), (c), (d); Laws of 1925, ch. 80; 1927, ch. 89. *Ibid.*

8. *Same—Injunction.*—Where the owner has not paid the back taxes due within the county and their collection by the sheriff is authorized by statute, the mere fact that the sheriff knew the lessee had agreed with the owner to pay them and had given the former certain indulgence or extension of time for their payment, or that the sheriff had made settlement for the taxes, or that he had not given the owner notice of the lessee's delinquency, does not relieve the owner of liability for their payment or entitle him to injunctive relief against the sheriff's foreclosure upon the lands. *Ibid.*

9. *Same—Written Notice—County Treasurer—Parties.*—In order to recover moneys illegally or unlawfully demanded of the sheriff from the owner on lands situated within the county, and paid by the owner

TAXATION—*Continued.*

under protest, and not returned to him, the statute does not authorize suit against the sheriff for its recovery, and the statutory method must be pursued by suit against the county, etc., by whose authority or for whose benefit the tax was levied, after thirty days written notice to the treasurer thereof. *Ibid.*

10. *Taxation—Counties—Bonds — Necessary Expenses—Elections—Vote of People—Refunding Debt—Statutes.*—Under the Municipal Finance Act (ch. 81, sec. 8(j), Public Laws of 1927), a county may fund an indebtedness incurred before its ratification for necessary expenses by the issuance of its bonds in anticipation of its receipts for taxes when authorized by statute, without submitting the question to the vote of its people. *Hartsfield v. Craven County,* 358.

11. *Same — Municipal Finance Act — Repealing Statutes.*—The Municipal Finance Act, by express provisions, repeals a public-local law applied to a county when inconsistent with its terms. *Ibid.*

12. *Same—Schools—Constitutional Law.*—While bonds issued by a county for the maintenance or equipment of its public schoolhouses are not issued for a necessary expense, Const. of N. C., Art. VII, sec. 7, they are valid when issued under the power conferred by statute when necessary to maintain the six months term of school made mandatory by our Constitution, and when issued in accordance with the statute authorizing it, the bonds are a valid indebtedness of the municipality without submitting the question of their issuance to the vote of the people. *Ibid.*

13. *Same.*—Where a county under power conferred by special statute has borrowed money from time to time for the maintenance and equipment of its public schools, its bonds to refund the indebtedness so incurred are valid if issued in conformity with the provisions of the general Municipal Finance Act, chapter 81, sec. 8(j), Public Laws of 1927. *Ibid.*

14. *Taxation—Counties—Bonds—Municipal Finance Act—Statutes—Necessary Expenses—Constitutional Law—Elections—Vote of the People.*—Under legislative authority a county may issue bonds to refund its existing floating debt for the necessary county expenses as enumerated in Constitution of North Carolina, Art. VII, sec. 7, in excess of the 15 cents limitation upon the $100 valuation of its taxable property according to Article V, section 6, of our Constitution, when coming within the provisions of the Municipal Finance Act, ch. 81, sec. 8, Public Laws of 1927, and where the record on appeal states that the issuance of the bonds is for necessary county purposes, and for taking care of its floating indebtedness, it will be assumed on appeal that the excess over the 15 cents valuation was for necessary county expenses, coming within the provisions of Constitution, Art. VII, sec. 7, not requiring the question of the issuance of the bonds to be submitted to the voters of the county. *Comrs. of McDowell v. Assell,* 412.

15. *Taxation—Statutes—In Pari Materia—Constitutional Law—Municipal Finance Act—Public-Local Laws—Necessaries—Elections—Vote of the People.*—It is the declared purpose of the Municipal Finance Act to put the various counties of the State in a position to live within their incomes, and where a county has an existing floating indebtedness

TAXATION—*Continued.*

incurred for necessary county expenses prior to the date of its passage, and a special statute relating to a particular county alone is intended to be generally interpreted as prospective in its effect, but contains a provision by which a past valid indebtedness may be funded by it by the issuance of its bonds, and the general and local statutes have been passed at the same session of the Legislature and ratified on the same day: *Held,* construing the two statutes *in pari materia* when complied with, it is the legislative intent that the local statute does not take from the county the right to issue bonds for funding its past valid floating indebtedness, and where this expense has been incurred for necessary county expenses within the meaning of our Constitution, Art. VII, sec. 7, the question of the issuance of bonds is not required to be submitted to the voters of the county. *Ibid.*

16. *Taxation—Municipal Corporations—Cities and Towns—Bonds—Necessary Expenses—Ordinances—Statutes—Vote of People—Elections.*—While an incorporated city or town may issue bonds for a sewer and water system as a necessary expense, without submitting the question to its voters, it may nevertheless provide by an ordinance passed for the purpose that the bonds shall be so submitted, and then the proposed issue will require for their validity that the voters approve them at an election to be held accordingly, the ordinance in this respect having the force of a statute. 3 C. S., 2938(2)(3), 2948. *Adcock v. Fuquay Springs,* 423.

17. *Taxation—Elections—Municipal Elections—Statutes — Interpretation—Time for Holding Elections.*—For an incorporated city or town to issue valid bonds wherein it is required that its voters approve, it is made mandatory by statute, C. S., 2948(2), that the special election therefor be held at the regular municipal election next succeeding the passage of the ordinance, but not within one month before or after a regular election, and the term "general election" is interpreted with the antecedent words of the statute "municipal election," and excludes a general State or National election. *Ibid.*

18. *Same—Calendar Month—Computation of Time.*—The requirement that municipal elections for the issuance of bonds shall not be held within one month before or after a regular municipal election, C. S., 2948, refers to a month according to the designation in the calendar without regard to the number of days it may contain, (C. S., 3949(3), and is computed by excluding the first and including the last day thereof. C. S., 922. *Ibid.*

19. *Taxation—Inheritance — State Bonds — Exemptions—Statutes.*—An inheritance tax is that imposed upon the taking of property by descent and distribution, or by will, from the decedent, and is not a property tax, and its collection is not prohibited by the statutory provision exempting the owners of State bonds from taxation by "all State, county or municipal taxation and assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise," etc., and *held further,* the redrafting of section 6, chapter 4, Public Laws of 1923, by the act of 1927, ch. 80, Art. I, schedule A, clarifies and does not destroy the principle upon which this decision rests. *Waddell v. Doughton,* 537.

TAXATION—*Continued.*

20. *Taxation — Counties — Foreclosure — Sales — Notice—Statutes.*—In an action by the county to foreclose upon the lands of a delinquent taxpayer for the nonpayment of his taxes, C. S., 8037, due for 1920, and since, the notice required by chapter 159, section 51, Public Laws of 1897, construed as a condition precedent to the sale, is superceded by C. S., 8014, requiring the sheriff before making such sale to give public notice of the time, place and cause thereof, with such other notice required by the preceding section, 8013, that the sheriff serve upon the delinquent at least twenty days before the sale of his real property, a copy of so much of the advertisement as relates to him. *Craven County v. Parker*, 561.

21. *Same—Purchase—Title.*—In an action by a county to foreclose upon the real property of a delinquent taxpayer, it is not required for the plaintiff to show that the sheriff had served a copy of the advertisement on the delinquent as provided by C. S., 8013, and his failure in this respect is not regarded as fatal to the maintenance of the county's action to foreclose, C. S., 8028, 8029; and, *held further*, the county, when the purchaser, is not required to make affidavit of the fact of notice given under the section 8029. *Ibid.*

22. *Same—Personal Property—Lands—Real Property.*—C. S., 8006, providing for the sale of the personal property of the delinquent taxpayer before that of his realty, is for the benefit of the taxpayer, and the failure of the sheriff to comply therewith does not affect the title of the purchaser at the sale under foreclosure of the realty for taxes. *Ibid.*

23. *Same—Description of Lands—Parol Evidence.*—The description of the real property advertised to be sold by the sheriff of the county for nonpayment of the taxes of a delinquent giving his name and the number of acres "Washington Road, No. One Township," is not too vague for or uncertain to admit of parol testimony of identification, when the designated owner has but one tract of real estate in the county advertising the sale in its proceedings to foreclose. *Ibid.*

24. *Same—Penalties—Interest—Judgments.*—In an action by the county to foreclose on the real property of a delinquent taxpayer, the statutory penalty applies, and the defendant cannot successfully maintain that before final judgment only straight interest is recoverable. *Ibid.*

25. *Taxation—Counties — Sheriffs — Actions — Publication of Sale—Newspapers—Parties.*—Publication of sale of real property for unpaid taxes as directed by the statute on the subject, is the official duty of the sheriff, and to be made on the day directed by the county commissioners; and the newspaper in which these notices are published has a right of action against the sheriff contracting for their publication, and not against the board of county commissioners, which only makes an allowance to the sheriff to cover such charges. C. S., 8014, 8015, 8009. *Lane v. Graham County*, 723.

26. *Taxation — Constitutional Law — Statutes — Curative Acts.*—Where a county has levied a tax for general county purposes in excess of that permitted by our Constitution, Art. V, sec. 6, which a property owner has paid under protest, and has reserved his right under the pro-

TAXATION—*Continued.*

visions of C. S., 7979, it may not be validated by an act passed after the assessment had been passed upon or levied under the former statute. *R. R. v. Cherokee County*, 781.

TELEGRAPHS.

1. *Telegraphs — Negligence — Damages — Courts — Jurisdiction — Federal Courts.*—The decisions of the United States Supreme Court control in an action brought in the State court to recover damages for the delay in delivery and error in the transmission of money sent by telegraph from a point in North Carolina to one in another state, and as to whether stipulations appearing upon the message are void as against public policy. *Waters v. Tel. Co.*, 188.

2. *Same—Measure of Damages—Mental Anguish.*—Under the Federal decisions a recovery of damages for mental anguish, unaccompanied by pecuniary loss or physical pain, or the loss of property or impairment of health or reputation, is not allowed. *Ibid.*

3. *Same—Torts—Proximate Cause—Speculative Damages.*—In order to recover damages of a telegraph company for its negligent failure to correctly transmit or deliver an interstate transmission of money, such damage must be the proximate cause of the negligence complained of, resulting from the negligent act complained of in a continued and unbroken sequence as a reasonably anticipated consequence of the tort, and not such as are purely speculative or remote. *Ibid.*

4. *Same—Notice to Company—Transmission of Money by Telegraph.*—The fact that money is transmitted by telegraph is sufficient notice to the company of the importance of its prompt delivery to the sendee, and where the defendant's agent at the originating point was aware that it is for the use of a member of the sender's family at the delivery point, it is sufficient to put it upon notice that its failure to act with the promptness reasonable for a service in such instances would likely result in damages as the proximate cause. *Ibid.*

5. *Same.—Held*, under the facts of this case, a recovery cannot be had of a telegraph company for injury to health arising from the sickness of the sendee, of which the defendant had no knowledge, express or implied, in failing to get the amount of money the defendant should have delivered in the exercise of reasonable care, but only such as would have been reasonably anticipated as proximately resulting to a sendee in normally good health. *Ibid.*

6. *Telegraphs—Negligence—Contracts—Stipulations on Message — Unrepeated Messages—Damages.*—The stipulation on a telegram restricting the recovery in the event the message is unrepeated, is valid under the United States statutes and decisions of the United States Supreme Court. *Ibid.*

7. *Same—"Sixty Days"—Stipulation as to Bringing Action.*—The stipulation on a telegraphic message avoiding liability to the company for damages for its negligent transmission or delivery, if action is not brought thereon within sixty days, etc., is a reasonable and valid one. *Ibid.*

TENANTS IN COMMON. See Partition, 5; Wills, 1.

1. *Tenants in Common—Title—Sole Seizin—Adverse Possession—Burden of Proof—Instructions—Appeal and Error—New Trials.*—Where sole seizin by sufficient adverse possession is pleaded in proceedings to divide lands among tenants in common, and the admissions make out a prima facie case of the tenancy, and the questions as to the adverse possession is the only one involved upon the trial, the burden of proof is on the one setting up the defense, and an instruction otherwise is reversible error. *Lewis v. Lewis*, 406.

TENDER. See Executors and Administrators, 1.

TERMS. See Constitutional Law, 6; Indictment, 2; Jury, 2; Mortgages, 2.

TESTATOR. See Wills, 2.

TESTIMONY. See Evidence, 10.

TIME. See Executors and Administrators, 1; Taxation, 17, 18.

TITLE. See Deeds and Conveyances, 8; Ejectment, 1; Mortgages, 1; Quo Warranto, 1; Taxation, 21; Tenants in Common, 1.

TORTS. See Banks and Banking, 13; Telegraphs, 3.

TOWNS. See Highways, 6, 8.

TRAMROADS. See Master and Servant, 1, 7; Negligence, 10, 13.

TRANSACTIONS WITH DECEDENTS. See Wills, 7.

TRANSCRIPT. See Appeal and Error.

TRANSITORY ACTIONS. See Removal of Causes, 5, 6.

TRANSPORTATION. See Intoxicating Liquors, 1.

TREASURERS. See Counties, 1.

TRESPASS. See Criminal Law, 2.

1. *Trespass—Boundaries—Dividing Lines—Parties.*—In an action for trespass upon the plaintiff's lands and damages for the unlawful cutting and removing of timber trees, etc., growing upon the lands in dispute involving the question of the true dividing line between the adjoining lands of the parties, the question as to defendant's like trespass upon other lands and damages to the owners does not arise, and it is not error for the trial judge to refuse to make other parties to the action, or exclude evidence of their boundaries. *Waller v. Dudley*, 139.

TRIALS. See Appeal and Error, 8; Constitutional Law, 15, 16; Reference, 3, 4.

1. *Trials — Issues — Contracts — Pleadings—Counterclaim — Appeal and Error—New Trials.*—Where in an action to recover for goods sold and delivered a complete defense is set up in the answer upon a warranty, it is reversible error for the trial court to submit, over the defendant's exception, but one issue as to plaintiff's damages, and refuse to submit an issue tendered by the defendants upon the defense it had set up. *Gaskins v. Mitchell*, 275.

TRIALS—*Continued.*

2. *Trials—Nonsuit—Verdict—Damages—Appeal and Error—New Trials.*—In a personal injury negligent action brought by several plaintiffs, where a judgment of nonsuit as to the recovery of one of them is rendered, during the trial, who appeals, the verdict of the jury awarding damages to all is not available to the nonsuited plaintiff, as after the nonsuit he was not a party to the further proceedings, and must abide by a smaller amount of damages awarded by the verdict upon the subsequent trial. *Watts v. Lefler*, 671.

TRUSTS. See Banks and Banking, 1, 2; Courts, 7; Deeds and Conveyances, 8; Fraud, 2; Insurance, 1; Mortgages, 1; Removal of Causes, 3.

1. *Trusts—Implied Trusts—Fraud—Equity—Husband and Wife—Banks and Banking.*—Where the cashier of a bank has wrongfully appropriated the bank's money and buys lands, taking title to his wife, a trust is imposed upon the title in equity, by reason of the fraud, which may be followed by the bank into its converted form by suit for the purpose. *Bank v. Crowder*, 312.

TRUST DEEDS. See Sales, 1.

VALUE. See Executors and Administrators, 1.

VARIANCE. See Evidence, 3.

VENDOR AND PURCHASER. See Taxation, 2.

1. *Vendor and Purchaser—Misrepresentation as to Amount of Purchase Price—Justice of the Peace—Jurisdiction of Court—Courts.*—Where the purchaser of lands assumes an existing mortgage debt thereon and partly pays the difference and assumes the balance of the purchase price, he may recover in his action by the seller in the jurisdiction of the justice of the peace, the sum of $86, the difference between the actual amount of the existing mortgage indebtedness and the amount it was represented to be as an unjust enrichment of the seller, and the defense that the mortgage was a matter of record giving constructive notice of the amount due is not tenable. *Mitchell v. Moore*, 352.

2. *Same—Equity—Reformation of Instruments—Supreme Courts—Appeal and Error.*—Where the seller has misrepresented the amount of money due on a mortgage existing on the lands sold to the loss of the purchaser, and the difference falls within the jurisdiction of the justice of the peace, the equitable doctrine of reforming a written instrument has no application, and where the purchaser has brought his action in the court of a justice of the peace, the defense on appeal to the latter court that it could acquire no derivative jurisdiction is untenable. The distinction between the jurisdiction of the court in declaring an equity and enforcing a money demand which equitably belongs to a party, distinguished. *Ibid.*

VENIRE DE NOVO. See Criminal Law, 25.

VENUE. See Removal of Causes, 5, 6.

VERDICT. See Criminal Law, 8, 13, 23, 24, 25; Evidence, 26; Homicide, 4; Judgments, 1, 7, 9; Jury, 2, 7; Master and Servant, 1; Negligence, 13: Trials, 2.

1. *Verdict—Issues—Appeal and Error—Harmless Error.*—Where the answer by the jury to an issue fully determining the action is given under proper instruction an error in the instruction of the court on another issue will not be held for reversible error. *Lilley v. Cooperage Co.*, 250.

2. *Verdict—Polling Jury—Conflict—Entry—Appeal and Error.*—Where the jury has unanimously answered and returned their verdict to an issue in a civil action, and upon being polled three of them answer differently and explain by saying the answer first given was the one they had at first entertained before agreeing with the others, and again being polled the verdict is unanimously in accord with the answer of the issue handed in: *Held*, there is nothing to indicate that the verdict so entered was reached by outside influence or that its sacredness had been violated, and its entry as the verdict in the case is not erroneous. *Trantham v. Furniture Co.*, 615.

3. *Verdict—Agreement of Parties—Consent—Clerks of Court.*—The agreement of the parties to the litigation that the clerk may take the verdict of the jury, acquiesced in by the judge, is valid. *In re Will of Sugg*, 638.

4. *Same—Duty of Clerk.*—Where the verdict of the jury, apparently unanimous, is received by the clerk in the absence of the judge under an agreement of the parties, and a juror, upon being polled intimates that his mind had not accepted it, and further states that he would explain if he thought he could do so in the absence of the judge, it is the duty of the clerk to correctly inform the juror upon the matter, and when he has failed to do so, the subsequent setting aside of the verdict by the judge upon a finding, sustained by the evidence, is not error of law. *Ibid.*

5. *Verdict — Jurors — Polling Jurors — Unanimous Verdict—Verdict Set Aside—Impeachment—Affidavit of Juror.*—Where the judge has set aside a verdict of the jury, received by the clerk, upon an affidavit of a juror to the effect that he was under a misapprehension as to his right to disagree with the answers given, and there is no exception to the introduction of the affidavit: *Held*, the affidavit so considered was not in impeachment of the verdict, but an explanation of the juror's error therein. *Ibid.*

6. *Verdict—Reduction of Damages—Consent—Discretion of Court—Judgments—Statutes—Constitutional Law—Appeal and Error.*—The discretionary power of the trial judge to set aside the verdict of the jury for "excessive" or "inadequate" damages, does not extend to his authority to reduce the verdict and render judgment accordingly, unless assented to by the party against whose interest it has been done, C. S., 591, Constitution of N. C., Art. IV, sec. 8, and without this consent the Supreme Court, on appeal, will direct that the amount of the judgment be entered according to the verdict. *Hyatt v. McCoy*, 760.

VESTED REMAINDERS. See Estates, 1.

VESTED RIGHTS. See Constitutional Law, 1.

VIOLATION. See Negligence, 14.

VOLUNTARY DISSOLUTION. See Banks and Banking, 9.

WAIVER. See Bills and Notes, 2; Courts, 1; Insurance, 5, 6, 7; Jury, 4; Reference, 3.

WARNINGS. See Evidence, 8; Highways, 1.

WARRANTY. See Deeds and Conveyances, 9.

WATER SYSTEMS. See Government, 1.

WATERS AND WATER COURSES.

1. *Waters and Water Courses — Cities and Towns — Streets — Surface Waters—Negligence—Damages.*—Where there is evidence tending to show that a city has formerly constructed and maintained a proper drainage for its streets then sufficient to carry off the surface water, and prevent its accumulation to the damage to property situate upon the same, and by a change to hardsurfacing its streets the flow of the water has been so largely increased as admittedly to render its drainage system grossly inadequate: *Held,* it is sufficient to make out a case of actionable negligence against the city for damages caused to an owner of lands by reason of an overflow of water destroying a garage he had erected. *Gore v. Wilmington,* 450.

2. *Same—Drainage.*—In hardsurfacing its streets and largely increasing the flow of surface water thereon, a city is required in the exercise of due care, to provide drainage reasonably sufficient to carry off the increase of the flow of water so as not to cause damages to the landowners. *Ibid.*

3. *Waters and Water Courses—Subterranean Waters—Pollution—Damages —Evidence—Nonsuit.*—Where a tank to supply large quantities of gasoline has been put into the ground by the defendant on property adjacent to that of plaintiff, and its use thus caused the seepage of gasoline into the ground in such quantities as to destroy the use of plaintiff's well of water used at his dwelling for drinking purposes, by entering into the underground water channels which gave him his water supply, the defendant is answerable for the damages thus caused, and the evidence in this case is *held* sufficient to take the issue to the jury upon defendant's motion as of nonsuit. *Masten v. Texas Co.,* 540.

WIFE. See Criminal Law, 16, 18.

WILLS. See Courts, 11; Estates, 3; Jury, 3.

1. *Wills—Devise—Heirs — Issues — Estates—Remainders—"Purchaser"— Tenants in Common.*—A devise of testator's land to one who had been raised as a member of his family, with direction that should he die without heirs then the lands so devised "shall go back to my beloved wife or her nearest heirs at law: *Held,* upon the death of the devisee unmarried and without issue, leaving a brother and sister, and the death of the wife leaving heirs at law, the word heirs used in the devise to the son means "issue" or children, and the estate so devised went under the will of the testator to the heirs at law of the wife by purchase as tenants in common. *Clark v. Clark,* 288.

WILLS—*Continued.*

2. *Wills—Intent—Interpretation—Beneficiaries as a Class—Death of Testator.*—Where the grandchildren of the testator are to take under the will as a class, being designated by name as the children of certain of his children, and there is no precedent estate or interest to intervene, the intent of the testator is construed and given effect with reference to his death, nothing else appearing. *Sawyer v. Toxey*, 341.

3. *Same—Date of Will—Afterborn Children.*—Where the grandchildren of the testator take under his will as a class as of the date of his death, and there is a further provision of the will as to other grandchildren born after the date of the will, the further provision applies to such other grandchildren who are alive at the time of testator's death, and not to those who may thereafter be born. *Ibid.*

4. *Wills—Devise—Fee Simple—Statutes — Presumptions—Intent.*—Under the provisions of C. S., 4162, a devise of lands is presumed to be of the fee unless it may be sufficiently gathered from the other expressions of the will that the testator intended to pass an estate of less dignity, and *held*, a devise to testator's two daughters, B. and M., all of the testator's real estate after the death of his widow, and also to his daughter T. an equal life interest therein with B. and M., "or so long as the said T. may remain a widow." Upon the death of the testator's widow, B. and M. took in remainder a fee-simple estate, with the intent to provide for T., who remained unmarried and is now deceased, during her widowhood. *Barbee v. Thompson*, 411.

5. *Wills—Legacies—Ademption—Intent.*—Ademption, in law, denotes the destruction, revocation or cancellation of a legacy in accordance with the intent of the testator, and results either from express revocation, or is implied from acts done by the testator in his lifetime, evincing an intention to revoke or cancel the legacy. *King v. Sellers*, 533.

6. *Same—Parent and Child—Reinvestment.*—A devise by the testator to his daughter of a specified legacy in a certain amount, payable to him and secured by mortgage on certain lands of the mortgagor, and the amount collected by the testator in his lifetime and diminished by his reinvestment to another with mortgage security on other lands, and outstanding at the time of the testator's death, does not alone evince the intent of the testator to adeem the legacy in its diminished amount, nothing else appearing, but the difference in money between the two investments commingled with the other funds of the testator by him in his lifetime, does show such intent to adeem to that extent. *Ibid.*

7. *Wills—Caveat — Proceedings in Rem — Parties.*—The proceedings to caveat a will are *in rem*, and not strictly to be regarded as adversary. *In re Will of Brown*, 583.

8. *Same—Deceased Persons—Transactions and Communications—Statutes —Mental Capacity—Opinions—Party in Interest—Beneficiaries.*—The beneficiary under a will may not testify to transactions and communications with the deceased, C. S., 1795, but he may in proceedings of *devisavit vel non* give his opinion, based on his own observations, as to the mental incapacity of the deceased at the time of the execution of the writing propounded, and then testify to personal transactions he has had with him as being a part of the basis of his opinion,

WILLS—*Continued.*

when evidence of this character is properly so confined upon the trial by instructions or otherwise, the weight and credibility being for the jury to determine. *Ibid.*

9. *Same—Declarations—Evidence.*—Where there is evidence upon the issue of *devisavit vel non* that the testator had long considered the disposition he desired to make of estate by will, had in fact made a will accordingly providing for certain of his near blood relations whom he held in affectionate regard when admittedly of sufficient mind, it may be shown in evidence upon the issue that in the writing propounded, made more recently before his death, he had left out of consideration these relations and given his entire property to his wife, for whom he had intended to provide to a less extent. *Ibid.*

10. *Same—Mental Incapacity.*—Declarations of a deceased person, admittedly made when he was of sound mind and disposing memory, showing a long cherished, settled and unvarying purpose with respect to the disposition of his property by will, are competent, in connection with other supporting evidence, upon the trial of an issue involving his mental capacity at a subsequent date not too remote from the time of the declaration, in which he executed a will in utter variance with such purpose, which is contested upon the ground of mental incapacity. *Ibid.*

11. *Same—Inferences.*—Upon the issue of *devisavit vel non* upon the caveat to a will, evidence that the testator should have been aware of his possession of a large estate and was under the erroneous impression at the time he made the will in question, that he was almost without the means of support, is competent upon the question of his mental capacity to have made it, involved in the issue of *devisavit vel non. Ibid.*

12. *Wills—Mental Capacity.*—A person is in law deemed to have sufficient mental capacity to make a will when he has a clear understanding of the nature and extent of his act, the kind and value of the property devised, the persons who are the natural objects of his bounty, and the manner in which he desires to dispose of it. *Ibid.*

13. *Wills—Caveat—Judges Superior Court—Witnesses—Appeal and Error.*—Where during the trial upon the issue of *devisavit vel non* it is made to appear to the trial judge that the testimony of a judge holding the courts of another district is of sufficient importance, it is not error for him, in the absence of the jury, to telegraph this witness, not subject to subpœna, requesting him to arrange his court so as to attend as a witness. *Ibid.*

14. *Wills—Bequests of Personal Property—Intent—Gifts—Descent and Distribution.*—A bequest of personal property to the testator's wife for the term of her natural life, subject to her support, use and enjoyment, is to the extent not so used by her, descendible to her next of kin, at her death intestate, according to the testator's intent gathered from construing the instrument, there being no specific limitation over, or residuary clause in the will, and the expressed purposes of the bequest, "for her support, comfort and enjoyment" are consonant with an absolute gift. *Jordan v. Sigmon*, 707.

WITNESSES. See Evidence, 10, 13; Wills, 13.

1. *Witnesses—Bookkeeping — Experts — Banks and Banking—Meaning of Entries of Books of Bank—Embezzlement.*—An expert witness properly qualified may testify to entries made by its cashier upon the books of a bank, and their meaning tending to show his defalcation, when material to the inquiry. (See, also, *Bank v. Crowder, ante,* 312.) *Bank v. Crowder*, 331.

WRITTEN INSTRUMENTS. See Bills and Notes, 4; Contracts, 2; Principal and Agent, 1.

WRONGFUL DEATH. See Actions, 2; Negligence, 19.

YEAR. See Taxation, 1.

ZONING DISTRICTS. See Constitutional Law, 7.